## United States Court of Appeals for the Second Circuit



**APPENDIX** 

# 5-110

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

JOHN : DWYER.

Defendant-Appellant.

On Appeal from the United States District Court of the Southern District of New York

#### APPENDIX FOR DEFENDANT-APPELLANT JOHN J. DWYER

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S Cr. 311

To Man J. 1 Tro. I. J. Dioving and

Defendants.

#### COURT OFF

The Grand Jury charmes:

Prom on or about the 27th day of July, 1977, 1977, 1977 to and including on or about the 1th day of Color, 1977 in the Southern Bistrict of May Nork, STEPFUP J. 1977.

JOHN J. DUDTR and JOHN S. POTRAMSKI, the defendance, did willfully, unlawfully, and bearingly continue, conspire, considerate and angre to scher and with each other and with other persons to the Grand Dary when a to sent a train offense anginst the Laired States, to wit, so violate Sections 5.11, 5012, 58 3.61) and 5.601(e) of Title 26. Wited States Gode.

SHITH, JOHN J. BIYER and JOHN S. DORPHUSKI, the defendances, would transfer certain firearms, to vit, (1) a 9cm. German subsychine gum, nodel 100-40, Serial No. 7004; (2) a 7.62mm. Russian subsychine gum, model PPSH, Serial No. 3070; and (3) a 9cm. Eucquarna Vanenfabriks A.B. with attachable shoulder stock (chort - barreled rifle). Serial No. D6865, in violation of the provisions of Title 26, United States Code, Sections 5011, 5012 and 5861(e).

To Curthermore of anid complyings and the section the obtains thereof, the defendance exist and the fallowing exact acts, arong exhaust, in the South on District of Him York and elsewhere:

- 1. On or about September 1, 1974 at approximately 1:00 P.M. SECREDI J. SECTO, John J. 1970R and ORS S.
  DENUMERIC Let at 169 October Prive, building 1., Packets 1, John York.
- 2. On or about September 1, 1974 at approximately 1:30 P.M. STEPHEN J. SHITH, JOHN J. I NYER and DEN S. DOERALISKI transferred two submachine guns, to vit, (1) to 9:21. German submachine gun, model MP-40, Serial No. 7287: and (2) a 7.6222. Russain submachine gun, model PPFI, Syrial No. 3070, in eyebrage for \$900 in cash.
- 3. On or about October 5, 974 at a mondmate / 3:00 P.M. ST TFIELD, SMITH, JOHN J. DOYER and J. BUL S. DOBRAUS'CL set at 169 Onlwood Drive, B illing 1/2. Peckshill.

(Title 13, United States Core, Sectio . 371).

#### COLUMB SIND

On or about the 27th day of July, 1974, in the Southern District of New York, STIPHEN J. SHITH, the defendant, unlawfully, vilifully and knowingly did transfer a firearm, to wit, a 9th. German Luger automatic pistol with attaching artillery shoulder stock (short - barreled rifle), Serial To. 3802, in violation of the provisions of Title 26, United States Code, Sections 5311 and 5312, that is, without having filed with the Secretary of the Transmit or his delegate a written application to transfer and recipter the said firearm to the

deer many of the Treatmry or his delegate for the transfer and registration of and fire and to the transfer and registration of and fire and to the transfer and thint beater poid the art due and payable on the transfer of each fireart.

(Male 20, United Screen Code, Sections 5311,

#### COLUC TIVE

It the Southern District of New York SUPPLIES, SHIPS, JOHN J. NYTHER and JOHN S. DOG MISSE, the defer lands, milestrictly, willfully and knowingly did transfer corrain filtering, to vit, (1) a few. derem releashing put, and herein for the provisions of little 25, Whitel States Code, Ce tions built and 5512, that is, without having filed with the Secretary of the Treashy or his delevate a written application to transfer and without raving secured the approviation for the beretary of the Treashy or his delevate for the transfer and register the said firemans to the previous of the Treashy or his delevate for the transfer and register the said firemans to the previous of the Treashy or his delevate for the transfer and register tion of said firemans to the transfer and register the transfer and without having paid the tax due and payable on the transfer of said firemans.

(Title 26, United States Code, Sections 5011, 5012 and 5861(e) and Title 10, United States Code, Section 2).

#### COILL LIMO

On or about the Sth day of October, 1975 in the Southern District of Res York, proping J. SHIFE, John A. J. Walk and John S. POBRANCHI, the Jefendants, unlawfully, will ally sell incrinely did to vive and consers a firearm, to vit, a non, Husquarna Vancountrilla A.B. with octaching

The time of the control of the contr

(Fittle 25, United States Code, Section 5361(d) and Witte 13, United States Cole, Section 2).

#### CHAIT FOR

the Southern District of Haw York. TEDREN J. CHICH, the defendant, unlawfully, willfully and knowingly did receive and possess certain firearms, to wir, (1) a 2 m. Labrine Noticeal D'Armes subscribe pistol with actual my shoulder attack (short - barreled rifle), Ser al No. 300; e.d (2) a 2 m. Uniformly Knuser subscribe pistol with actual my shoulder attack (short - barreled rifle), Ser al No. 300; e.d (2) a 2 m. Uniformly Knuser subscribe pistol with actual my shoulder attack (short - barreled rifle), Serial No. 28 M63, which firearms were not respectived to him in the Harborni Firearms Registration and Transfer Legard.

(Title 25, United States Code, Section [ 351(d)).

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United States Actorney

BEST COPY AVAILABLE

## DEFENDANT JOHN J. DWYER'S REQUEST TO CHARGE (Filed December 9, 1975)

MILTON DIAMOND Attorney for Defendant The Gate House - River Road Highland Park, New Jersey 08904 (201) 846-2500

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

VS.

STEPHEN J. SMITH, JOHN J. DWYER, and JOHN J. DOBRANSKI,

Defendants.

75 Cr. 311 (KTD)

DEFENDANT JOHN J. DWYER'S REQUESTS TO CHARGE

The defendant, JOHN J. DWYER, respectfully requests the Court to include the following in its charge to the jury:

Defendant John J. Dwyer's Request to Charge

#### REQUEST NO. 1

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

### OPENING STATEMENT OF MILTON DIAMOND (Dated December 16, 1975)

mmeg 1

THE COURT: Counsel, do you wish to open?

MP. DIAMOND: May it please your Honor and counsel, ladies and gentlemen of the jury: In his opening to you, the United States Attorney failed to mention one important aspect of the law in our American form of juris. prudence, and that is before a defendant can be proved guilty of a crime, the prosecution must prove criminal intent beyond a reasonable doubt, that is, that the defendant in this case, my client, John Dwyer, knowingly committed an unlawful act.

Now, our defense in this matter, ladies and gentlemen, is that John Dwyer, a man 38 years of age, lacked criminal intent, lacked criminal motivation, lacked any desire whatsoever to violate the law, the reason being that John Dwyer had a mental defect at the time of these acts that did not enable him to form that criminal intent.

We have in this district, this federal district of New York, a code, Section 4.01, and the substance of that code dealing with insanity or criminal responsibility, in effect, says that if "c. Dwyer had some kind of mental defect, and that as a result of that mental defect he lacked substantial capacity to appreciate that his conduct was wrong, or, in the alternative, because of that mental defect John Dwyer was unable to make his conduct conform to the

75 Cr. 311

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requirements of law, then he is not guilty of any criminal intent, and, therefore, is not guilty of any crime that may be charged against him.

I think, perhaps, in order to make this a little more clear in your minds I might give you an example: If this is your book (indicating), and I know it is your book and I knowingly take this book with the idea of appropriating it for myself, I have what is known as criminal intent, because it is my intent to take something that belongs to you and does not belong to me. If, on the other hand, this is your book and I have another book and I think that is my book and I take it, then I am not guilty of any offense, because I did not intend to steal your property, I thought it was mine, it was a mistake.

In this situation that we are talking about, if this is, in fact, your book, but there are forces within me, coming out of my life from the time I was born, and as a result of all the things in the environment that have affected my life, affected it so that as a result I am somehow compelled to take your book because of some defect in my reasoning, then the law says that I am not guilty of any crime, because I did not knowingly, consciously do it.

Willingly do it: Forces within me compelled me to do it.

And that is the situation with John Dwyer.

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The United States Attorney wants to deal with a few days of John Dwyer's life. The law does not expect you to do that. The law expects us in a situation where we have raised such a defense, to deal with John Dwyer as a whole man, and you are to learn of John Dwyer as a whole man from his mother, who sits back here, from his father, who is sitting back here, from his brother, a Marine captain, from his cousin, who was also a veteran, and you are going to learn that John Dwyer since the time he was five years old began collecting paraphernalia of World War II, because his father at that time had gone to war, the second world war, and somehow over the years because of the kind of person that John Dwyer was, very peaceful, very passive, because of the problems that you will learn from the psychiatric testimony in this case, from the testimony of his parents, somehow John Dwyer's life began taking a mono-manical course, a fixation on one thing and one thing alone - the collection of World War II paraphernalia, helmets, uniforms, books on the second world war, guns and scabbards, knives, daggers, badges, everything imaginable about the second world war. This was his whole life. And at 38 years of age he has not married, he still lives with his parents. His whole life has been nothing but an obsession for this, even his occupation. Everything would sustain to help him with this

1 mmcg 4

obsession, so he would learn and understand more about the machinery of war.

I suspect that the prosecution will want you to believe that John Dwyer is some kind of a merchant, John Dwyer merchant in guns or death. But John Dwyer is not that kind of a man. John Dwyer, you will learn from the testimony, is a very passive man who took every bit of money he ever earned and invested more and more in this gun collection, until the collection filled rooms in his home, in his basement.

So what did the government do on this particular day? What did their Judas Iscariot, Steven Smith, what did they trap? Did they trap a criminal? They did not trap a criminal, ladies and gentlemen, and we will show you that; they trapped a poor, sick boy because of his obsession in these matters.

And we know that when you hear all the evidence in this case, not about this particular day, but about the whole man that John Dwyer is, about everything he is, about the military history in his family and about how he could not keep up with that family history, he sublimated his inability to do that through this collection, so that in truth he labored under such a defect, a mental defect, such a defect of reasoning, that he found it totally impossible in his life to conform to the requirements of law.

Thank you.

B1

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XXX

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Yes, I do.

A

1	mmjb	Smith-direct 4
2	Ų	How do you know him?
3	A	I met him through a friend of mine, another
4	collector.	
5	Q	When did you meet him?
6	A °	On the way to a gun show in May.
7	Q	In May of what year?
8	Α	1974.
9	Q	Do you see him here?
10	Λ	Yes, I do.
11	Q	Identify him.
12	A	He is sitting there in the blue jacket.
13	Q	Where is he in the blue jacket?
14	A	Over there (indicating).
15	Q	There are two men with blue jackets.
16	A	With the glasses, the gold rim glasses. The
17	man with the	glasses.
18		MR. DWYER: We concede this is John Dwyer for
19	the record,	your Honor.
20		THE COURT: Identification is conceded.
21	Q	You say you met him on the way to a gun col-
22	lectors' she	ow in 1974?
23	A	Yes.
24	Q	Did you have any conversations with him along
25	the way?	•

1	mmjb Smith-direct 5
2	A Yes, we did.
3	Q And what were they?
4	A We spoke in general of different things, and
5	that is when I found out he was a collector of machine guns.
6	0 What did he say to you?
7	A I said that it was like sitting on a powder
8	keg due to the fact that they are very illegal.
9	Q What did you say?
10	A That is the reason I did not bother with him.
11	Q sas anything else said about any other col-
12	lectors during that trip out to Columbus?
13	A Yes, and this other fellow spoke about a col-
1-1	'lector by the name of BSJ.
15	Q Wno spoke about BSJ?
16	A Jack and this other collector, they both knew
17	him.
18	O Did you ask him who he was?
19	A A friend of his, another collector in New Jersey.
20	Q Did you ask him what BSJ stood for?
21	A Yes.
22	Q What did ne say?
23	A Bull shit, John.
24	Q Now, when you returned from that show did you
25	meet a man by the name of Joe?

1	nmjb	Smith-direct 6
2	Λ	Yes, I did.
3	Q	How did you happen to meet him?
4	A	I met him through another gun collector, Pete
5	Costible.	
6		THE COURT: I don't think anybody heard that.
7		THE WITNESS: I met him through another gun
8	collector,	Pete Costible.
9	Q	Please talk more slowly and raise your voice.
10	The acousti	es are terrible.
11		Did you engage in transactions with a man by
12	the name of	Joe?
13	A	Yes, I did.
14	Q	And what was that?
15	Α	I sold him a pistol with a shoulder stock.
16	Q	And when was that?
17	Λ	July 27, 1974.
18	Q	Was anything else said during that transaction?
19	Λ	Yes, sir. Pete had mentioned that Joe collected
20	machine gun	s, did I know of anyone who had any.
21	Q	What did you say to that?
22	Λ	I told him I would ask around.
23	Q	Did you thereafter speak with Jack Dwyer?
24	Α	Yes, I called Jack, I asked him if he had any-
25	thing for sa	ile. He said yes, he had two, an MP-40 and a

	* * *
1	numjb Smith-direct 13
2	he had a Lewis gun for sale and would my friend be interested
3	in it. I said I would call him and find out.
4	Q And then?
5	A I called Jack.
6	Q When was that?
7	A Toward the end of September.
8	Q What was said? What did you say? What did
9	Jack Dwyer say?
10	A I asked Jack if he was interested in the Lewis
12	gun. He said he was. I said, "Well, maybe you have some-
12	thing to trade." He said he had the automatic ne was look-
13	ing to get rid of and a Husqvarna. He said he would have
14	to get \$600 for the automatic, around \$200 for the
15	llusqvarna.
16	• Pollowing that conversation did you receive
17	another letter from Jack Dwyer?
18	A Yes, I did.
19	Q Showing you what has been marked Government
20	Exhibit 29 for identification do you recognize that?
21	A Yes.
22	Q What is it?
23	A It is a letter addressed to me from Jack
24	Dwyer.

MR. LEVINE: The Government offers Government's

11	
1	mmjb Smith-direct 14
2	Exhibit 29.
3	THE COURT: Any objection? It is being offered,
4	I assume, solely as to the defendant Dwyer?
5	Isn't that correct, Mr. Levine?
6	MR. LEVINE: These letters are being offered
7	as statements by co-conspirators in furtherance of the
8	conspiracy.
9	THE COURT: Ladies and gentlemen, we are taking
10	into evidence subject to connection this letter, and until
11	the connection is made by the Government you will not get
12	to see the letter.
13	(Government's Exhibit 29 received in evidence.)
14	Q Did you thereafter speak with Joe?
15	A Yes. I told him that Jack was definitely
16	interested in the Lewis gun and that he had the automatic
17	and Husqvarna for trading.
18	Q When was that conversation?
19	A Around the 25th of September.
20	Q What else was said in this conversation?
21	A Jack said he was still having trouble with his
22	car and that he would get BSJ to drive him back up.
23	Q Did you thereafter receive two other letters
24	from Jack Dwyer?
25	

XXX

1	atmm	Smith-direct	15
2	Q Showing Y	ou what has been marked Go	overnment's
3	Exhibit 31 and Govern	ment's Exhibit 32 for idea	ntification,
4	do you recognize them	?	
5	A Yes, I do	•	
6	Q What are	they?	
7	A Letters a	ddressed to me from Jack l	Dwyer.
8	Q Would you	please give the date of	each?
9	A September	29th and October 1st.	
10	Q Which?		
11	A 1974.		•
12	Q Which doc	ument?	
13	A Exhibit 3	1 is the 29th of September	r, 1974, and
14	Exhibit 32 is the 1st	of October, 1974.	
15	Q For the r	ecord, would you please in	dentify Govern-
16	ment's Exhibit 10 and	Government's Exhibit 29?	
17	A Exhibit 1	0 is the 6th of September	, 1974 and
18	29 is the 23rd of Sep	tember, 1974.	
19	MR. BOYAN	: No objection.	
20	THE COURT	: Mark them in evidence.	
21	(Governme	nt's Exhibits 31 and 32 re	eceived in
22	evidence.)		
23	Q Mr. Smith	, when did you next speak	with Joe
24	after the receipt of	this letter dated October	1, 1974?
25	A I spoke t	o him that Thursday and to	old him that

XXX

Yes, they arrived between 12 and 12:30.

What happened?

22

23

24

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They came into the apartment. We talked a little bit. I brought out some of my collection things that I

B4

1	majb Smith-direct 18
2	Q Showing you what has been marked Government's
3	Exhibits 8, 9, 34 and 35, can you identify them?
4	A Yes.
5	Q Will you please identify them by exhibit number?
6	A Exhibit 8 is a Lehti stock and a Lehti Husq-
7	varna.
8	Q What is 8?
9	A 8 is a husqvarna and stock; 9 is an automatic
10	pistol.
11	34 is a flak jacket; 35 is a green suitcase.
12	Q Those were the items that Jack Dwyer showed you
13	in your bedroom in your home on October 5, 1974?
14	A Yes.
15	Q Then what happened?
16	A Jack and I came out in the living room. He sent
17	Joe in to look at the guns. Joe went in the bedroom, took
18	the suitcase and brought it back out in the living room.
19	Q What was said?
20	A Jack said he would have to get six.
21	Q Jack who?
22	A Jack Dwyer said that he would have to get 600
23	for the automatic, 200 for the Husqvarna.
24	Q Then what happened?
25	A I told Pete to go down and get the Lewis gun

1	mmjb	Smith-direct 19
2	out of the	car.
3	Q	What happened next?
4	Λ	Shortly thereafter we were arrested.
5	Q	Wno is "we"?
6	A	John Dobranski, myself and Jack Dwyer, Pete
7	Costible.	
н	Q	Now, Mr. Smith, were you indicted for the acts
9	you have de	scribed here?
10	A	Yes.
11	Q	On how many counts?
12	A	Five counts.
13	Q	Have you pleaded guilty to this indictment?
14	Λ	Yes.
15	Q	What count?
16	Λ	One count of conspiracy.
17	Q	Have you been advised of the maximum possible
18	sentence th	at you can receive on that plea of guilty?
19	A	Yes.
20	Q	What is it?
21	Α	Five years and a \$10,000 fine.
22		MR. LEVINE: No further questions of this wit-
23	ness.	
24		THE COURT: I must be sure there must be one
25	person on ti	ie jury who is addicted to nicotine. So we are

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2 going to have our morning break now.

The Clerk will escort you to the jury room from the courtroom.

(Jury excused.)

against the jury rail? Is that yours, Mr. Diamond?

MR. DIAMOND: Yes.

THE COURT: Will you please remove it?

MR. LEVINE: Your Honor, Mr. Diamond stated that Mr. and Mrs. Dwyer will be testifying. They are in the courtroom. I ask that they be excluded.

THE COURT: I will think about it.

(Recess.)

MR. LEVINE: Your Honor, I neglected to have the witness identify one more exhibit for identification, which I would like to do now with the Court's permission.

And, secondly, the Government would make application at this time that based on Mr. Smith's evidence that Mr. Dobranski has been connected to the conspiracy, and I would like to have the opportunity to pass the letters around to the jury.

THE COURT: In due time.

(Jury in box.)

BY MR. LEVINE:

25

1	mmjb Smith-cross 25
2	A Yes, sir.
3	Q How long have you been collecting guns?
4	A I collected in '63 to say '64'62 to '64,
5	then stopped. I was a dealer at that time. I discontinued
6	until I moved to Peekskill, which was maybe a matter of
7	three years.
8	Q Why did you discontinue selling guns in '64?
9	A I just got tired of it.
10	Q You got tired of 1t?
11	A Yes.
12	Q What aroused your interest again?
13	A I went to a couple of gun shows and started to
14	compile a list of weapons with shoulder stocks.
15	Q When you were a dealer in guns you would sell
16	these guns for a profit?
17	A No, sir, it was not a regular business.
18	Q It was not a regular business? Would you sell
19	them at a loss?
20	A No.
21	Q You sold them to make money, didn't you?
22	A I didn't sell very many.
23	Q Well, you said you dealt in guns. Were you a
24	qun dealer?
25	A I got the license mainly to collect them.

B5

1	nuajb	Smith-cross 26		
2	Q	So you were not a gun dealer them?		
3	Λ	No, sir, in New York State they have no such		
4	thing as a	collector's license.		
5	Q	When did you meet your first Government agent		
6	in this matter?			
7	A	It had to be the 27th, when a sold him a pisto	1.	
8	Q	What was his name?		
9	A	At that time I had known him as Joe Keane. Si	лен	
10	then I lear	ened that his name is Joe Kelly.		
11	o	What was your initial conversation with Joe		
12	Keane or Jo	oe Kelly?	!	
13	Λ	Just talking about collecting in general.		
14	Q	Where did you meet him?		
15	A	I met him through another collector, Pete		
16	Costabile.			
17	Q	When did you meet Pete Costabile?		
18	A	I met him at a gun show in Stratford, Connecti	-	
19	cut.			
20	Q	Was Pete Costabile also an undercover agent?		
21	4	Not to my knowledge.	İ	
22	Q.	Have you met any other undercover agents?		
23	Λ	No, not really.		
24	Q	So Joe Kelly was the only one you knew?		
25	Λ	Yes, sir.		

1	mmjb	Smith-cross	27
2	Ų	Tell us about this conversation that you	first
3	had with Joe	Kelly when you met nim.	
4	A	Pete had told me that Joe Kelly collecte	d
5	machine gun:	s. I told them I was not too interested	in them,
6	and he asked	d if I knew anybody who had any. I said	I would
7	ask around	for them.	
8	Q	Did you ask around?	
9	Α	I knew Jack was a collector.	
10	Q	So you called Jack?	
11	Λ	Yes.	
12	Q	And you arranged this meeting for Septen	ber 1st?
13		Yes.	
14	Q	wobody was arrested on September 1st? I	s that
15	right?		
16	Λ	That is right.	
17	Q	But Joe Kelly was there?	
18	A	Yes.	
19	Q	And he bought guns that day?	
20		No, I did not.	
21	Q	he bought?	
22	Λ	He bought two machine guns.	
23	Q	How much did he pay for the guns?	
24	Λ	\$900:	
25	Q	For two?	

1	nunji	Smith-cross	36
2	A	Yes, sir.	
3	Q	With a postmark on it?	
4	Λ	Yes, sir.	
5	Q	And Metuchen on it?	
6	A	Right.	
7	Q	It shows where it came from in New Jersey	?
8	A	Yes.	
9	Q	And you collected that envelope?	
10	A	Yes, sir.	
11	Q	And then on September 29th another envelop	oe -
12	and a lette	r you collected? Right?	
13	Α	Yes, sir.	
14	Q	And then on October 1, 1974, four days ber	fore
15	you were ar	rested you collected another envelope? Ric	jnt?
16	Λ	Yes, sir.	
17	Q	Again with Mr. Dwyer's name on it and with	ı a
18	postmark?		
19	A	Yes, sir.	
20	Q	When did you turn these envelopes over to	the
21	Government?		
22	Λ	During the course of the times I have been	n down
23	here prior	to testifying.	
24		THE COURT: Wait a second. I don't think	that
25	answers the	question, does it? The question is, "When	1."

1	mmjb	Smith-cross	38
2	letters or	envelopes away in your whole life?	
3	Α	Now and then I throw them away.	
4	Q	But you keep virtually all your letters as	nd
5	envelopes?		
6	λ	I even have old phone bills.	
7	Ω	Old phone bills, too?	
8	A	Yes, sir.	
9	Ω	When did you first realize that you had t	hese
10	incriminato	ory letters?	
11	A	I was asked by Mr. Levine if I knew of Ja	tes,
12	and I had s	scraps that I wrote things on, diaries and	things,
1:3	and I was q	joing through the drawers and I found the 1	etters.
14	Q	When you were arrested by Mr. Kelly	
15	Λ	Yes?	
16	Q	He interrogated you?	
17	Λ	Yes.	
18	Q	And as a result of his interrogation you	found
19	out he was	a pretty knowledgeable and experienced man	?
20		Yes, sir.	
21	Ω	You say he never asked you for a letter?	
22	Λ	No, sir.	
23	Q	And it was only until recently Mr. Levine	thought
24	of this?		
25	Α	Yes, sir.	

DECEMBER 17, 1975 mm jb 1

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UNITED STATES OF AMERICA

V.

75 Cr. 311

JOHN J. DWYER and JOHN S. DOBRANSKI

> December 17, 1975 10:00 a.m.

000

(In the absence of the jury.)

MR. LEVINE: Your Honor, a couple of matters. First, I guess with your permission Mr. Diamond and his client have brought in some paraphernalia into the courtroom which may or may not constitute all or part of Mr. Dwyer's collection. The Government strenuously objects to all that material remaining in the courtroom in the jury's view until such time as the appropriate withess takes the witness stand, identifies the material, and it is offered in evidence, and the Government has an opportunity to object to it on the basis of the offer of proof. To keep it in the courtroom at this time is prejudicial and unfair.

THE COURT: I don't think so.

Is there anything else?

MR. LEVINE: The Government would renew its objection to the presence of the defendant Dwyer's family

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Take 1 p.m.	1	mdltl	
	2	AFTERMOON SESSION	
-	3	2:10 p.m.	
_	4	(In open court - jury present.	)
	5	THE COURT: Call your next with	ness.
	6	MR. LEVINE: The government ca	lls Peter
	7	Costabile.	
	8	THE COURT: How many more with	esses do you
	9	have? I am not restricting you.	
	10	MR. LEVINE: Two short ones.	
	11	PETER CHRISTOPHER C	OSTABILI
	12	called as a witness on behalf of the	government,
	13	being first duly sworn, testified as	follows:
	14	DIRECT EXAMINATION	
	15	BY MR. LEVINE:	
_	16	O Mr. Costabile, do you know a ma	an by the name
	17	of Steven Smith?	
	18	A Yes, I do.	
	19	Q When did you meet him?	
	20	A 1 met him in May of 1974 in Co.	nnecticut at
	21	the Stratford Gun Show.	
	22	o and there come a time in the me	onth of 1974
	23	when you had a conversation with hr. Smith?	
	24	A At the gun show, when we spoke	on shoulder
	25	stocks for various types of weapons, and I	requested a

1	mdlt 2 Costabile-direct
2	shoulder stock for some of my Lugers and he said he would
3	get me one from the Columbus, Ohio gun shop.
4	Q When were you arrested?
5	A July 18, 1974.
6	O After you were arrested, did you agree to
7	cooperate with the government?
8	A Yes, I did.
9	Q What did you agree to do?
10	A I agreed to tell them what I know. I agreed
11	to in essence take machine guns off the street.
12	Did you agree to do anything specifically?
13	A Specifically?
14	O Yes.
15	A Not with relationship to any specific person,
16	no.
17	() Did there come a time when you spoke to Mr.
18	Smith again?
19	A Several occasions.
20	Q In the month of July, 1974, did you have
21	occasion to have a conversation with him?
22	A About one week after I was arrested, which
23	would make it about July 25th.
24	Mr. Smith called me up
25	THE COURT: Keep your voice up now. The

1	mdlt 3 Costabile-direct
2	accoustics in here are terrible.
3	A Mr. Smith called me up on the telephone in
4	my home in Connecticut and told me he had gotten me a
5	Luger shoulder stock from Columbus, Ohio, and he wanted
6	to sell it to me for \$150.
7	Q What happened after that?
8	A I expressed interest in that. We conversed
9	on guns. He also commented how he had various Lugers and
10	Husqvarnas for sale and whatnot, and I made arrangements for
11	Agent Kelly and myself to go up to his apartment in Pecks-
12	kill, New York, to see and buy something.
13	We got there and we bought a Simpson Shaw
14	Luger, which is a variation of a Luger shoulder stock.
15	Q Was anything else discussed on that day?
16	A When we got there, when Agent Kelly got there,
17	roughly speaking 12, 12:30 in the afternoon, we sat and
18	talked for a while, all three of us; Mr. Smith, Agent Kelly
19	and myself, on the topic of guns. Mr. Smith broke out a
20	box, or I believe it was a wooden box, loaded with all
21	types of hand guns and shoulder stocks.
22	. We looked at them all, we talked about them
23	all.
24	Q Was there any other discussion about any other
25	

kinds of guns?

1	mdlt 4 Costabile-driect	
2	A Yes, there was.	
3	Q What was that conversation?	
4	A Mr. Smith asked, when I told let's go	back
5	aways.	
6	When I told Mr. Smith that I was going to	
7	bring a friend with me on our telephone conversation be	efore
8	we got there, he asked if my friend was okay and all,	and
9	I said yes.	
10	And I told him at that time that my friend	1,
11	Joe, meaning Agent Kelly, was interested, he was a coll	lecto
12	of heavier weapons, is the way I phrased it.	
13	During this meeting with Mr. Smith at his	
14	apartment Mr. Smith brought this up and said he had a	
15	friend which should that Joe Kelly and his friend sh	nould
16	get together, they both had the same interest in common	n.
17	. Q Did there come a time when you got togethe	er?
18	A Yes.	
19	Q And what was that?	
20	A We actually got together on September 1, 1	1974.
21	Q Where was that?	
22	A In Mr. Smith's apartment in Peekskill.	
23	Q Who was present?	
24	A When Agent Kelly and I got there at about	
25	1 or so, Mr. Smith, and a man introduced to me as Jack,	and

1	mdlt 9 Costabile-direct
2	A This is the list that I was given in the
3	apartment by Jack.
4	Q Was anything else said that day after the
5	purchase?
6	A Yes. Just as we were ready to leave, I brough
7	up the fact to John about the bullet. I had a very unusua
9	9 millimeter bullet which
	Q Excuse me, which John is that?
10	A Dobranski. I call him John.
11	With reference to this 9 millimeter bullet
13	and I told him, I asked him, really, if he would give me
14	his address I would send it to him, I would mail it to him
15	and I had this piece of paper, and I just I had it
16	folded up like this, the wrinkles are still in it. I pull
17	itout of my pocket and he jotted his name and address and
18	zip code on the back so I could mail him the bullet.
19	Q Did he do that in your presence?
20	A Right in front of us.
21	MR. LEVINE: I mark this Government's Exhibit
22	33A.
23	(Government's Exhibit 33A was marked for
24	identification.)  THE COURT: The back side?
25	MR. LEVINE: That's correct.
1	THE THAT S COLLECT.

	mdlt 10	Costabile-direct
1	mare 20	THE COURT: Show it to your opponents.
2		
3		MR. LEVINE: I will.
4		(Pause.)
5		MR. DIAMOND. No objection.
6		MR. BOYAN: No objection, your Honor.
7		THE COURT: All right. Mark it in evidence.
8		(Government's Exhibit 331 was received in
9	evide	nce.)
10	Q	Mr. Costabile, did you ever send John Dobranski
11	the bullet?	
12	Λ	Yes, I did.
13	Q	After that short conversation was anything else
14	said?	
15	Α .	No. Agent Kelly and I left.
16	Q	Did there come a time when you saw Mr. Smith,
17	Jack Dwyer a	nd John Dobranski again?
18	Λ	We had a second meeting on September 1st of
19	1974.	
20	Q	A second meeting when?
21	A	On September 1st of 1974.
22	Q	I think you just testified to a meeting on
23	September 1,	1974.
24	۸	I'm sorry.
25	, 0	Did there come a time when you had a second

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1	mdlt ll Costabile-direct
2	meeting?
3	A I'm sorry, October 5th, the day of the arrest.
4	Q Pardon?
5	A The second meeting was October 5th.
6	Q Where was that?
7	A The same place, in Mr. Smith's apartment.
8	Q Who was present?
9	A Initially, just Mr. Smith.
10	Q And?
11	A Agent Kelly and myself.
12	Q Did there come a time when Jack Dwyer and
13	John Dobranski arrived?
14	A About an hour and a half later.
15	Q Would you please tell the court and jury to
16	the best of your recollection what was said at that time?
17	A Jack and John came in. Jack was carrying a
18	green suitcase and John was carrying nothing. We said our
19	hellos. Mr. Smith and Mr. Dwyer went into the bedroom with
20	the green suitcase, and Mr. Dobranski, myself and Agent
21	Kelly stood in the living room generally talking.
22	Q What was said during that conversation?
23	A It was very short. Agent Kelly asked almost
24	immediately what Jack had in the suitcase, and Mr. Dobranski
25	reply was "Some toys."

	38a '::::
1	mdlt 12 Costabile-direct
2	Q Then what happened?
3	A Agent Kelly went into the bedroom. I and Mr.
4	Dobranski continued our conversation with respect to this
5	bullet that I sent him. A few moments later Agent Kelly
6	came out carrying a 44 automatic, which is a pistol,
7	followed by Mr. Dwyer a few moments later and Mr. Smith
8	carrying a I believe a Swedish Lahti.
9	Q Then what happened?
10	A Well, we sat, we had a few drinks, we ate
11	cold cuts, we again talked. Nothing specific. Just general
12	talk.
13	A short period of time went by and Agent
14	Kelly told me to go down to the car and get the Lewis
15	machine gun that we had brought with us. I did. And
16	Q Did you ever go back into the apartment?
17	A Yes, I did.
18	I went down, I got the Lewis machine gun out
19	of the trunk, we had it inside a gun case, which was the
20	signal for the agents
21	Q What did you do after that, Mr. Costabile?
22	A After I left the apartment?

I didn't actually do anything after that. I left the apartment.

Q Yes, sir.

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## Costabile-direct

If my sweater was in my pants, that was an indication of the guns that they were brining from New Jersey were not visible.

If my sweater was out of my pants, it was an indication that everything they brought was visible, and for the federal agents to move in.

I walked directly to the trunk of the

Cougar at the time, took out the Lewis machine gun. The

agents came from all angles. I showed them to the correct

apartment, got them into the place, and they seized all the

guns and shoulder stocks --

Q Where were you at that point?

A I am entering back into Mr. Smith's apartment.

Along with quite a few federal agents from Poughkeepsie,

Peekskill Policemen, and they gave everybody their rights,

started confiscating all the weapons and whatnot.

- Was that the end of the transaction on that day?
  - A That's the end of it.
- Q Now, Mr. Costabile, do you have an understanding with the government about your case?
  - A Yes.
  - Q What is it?
  - A If I cooperated with the government, I -- they

1	mdlt 14	Costabile-direct
2	would allow	me to plead guilty to one charge.
3	Q	What kind of charge?
4	A	Conspiracy, I believe it was.
5	Q	Was there anything else?
6	Λ	Mr. cold said that he would inform the Judge
7	that happene	d to be standing over my case of what I have
8	done.	
9	Q	Was there anything else?
10	Λ	Just that I would be reimbursed for phone
li	calls and ga	s and various expenses. That was it.
12	Q	Mr. Costabile, were you arrested in 1968?
13	Λ	Yes, I was.
14	Q	For a violation under the Youth Corrections
15	Act?	
16	A	Yes.
17	Q	And you received probation?
18	A	Yes.
19	Q	Excurs me, Mr. Costabile, you were arrested
20	for the inte	rstate transportation of stolen property, isn't
21	that correct	?
22	Α -	Government property.
23	Q	And you were charged under the Youth Corrections
24	Act?	
25	Λ	Correct.

1	mdlt 15 Costabile-direct/cross
2	Q You were subsequently convicted of that
3	charge, and sentenced under the Youth Corrections Act,
4	isn't that correct?
5	A To probation, yes.
6	MR. LEVINE: Nothing further, your Honor.
7	THE COURT: All right, Mr. Diamond.
8	CROSS EXAMINATION
9	BY MR. DIAMOND:
10	Q Mr. Costabile, where do you live?
11	A In Connecticut.
12	Q And do you live there with your wife?
13	MR. LITTLEFIELD: Objection, your Honor, this is
14	not relevant.
15	THE COURT: I don't know whether it is or
16	not, but it doesn't seem to be.
17	MR. DIAMOND: It is, your Honor, in light of
18	the what I hope to bring out.
19	THE COURT: We don't know if he is married
20	yet.
21	Are you married?
22	THE WITNESS: No, sir, I am not. I am
23	divorced.
24	THE COURT: He is divorced.
25	MR. DIAMOND: I have a sheet on this man,

1	mdlt 16 Costabile-cross
2	Peter C. Costabile, given to me by the government.
3	"Marital status: Married."
4	THE COURT: He might have been.
5	MR. LITTLEFIED: What is the date on that, Mr.
6	Diamond?
7	MR. DIAMOND: I have 7/19/74.
8	MR. LITTLEFIELD: Perhaps that explains it.
9	THE COURT: When was your divorce?
10	THE WITNESS: November 25, 1975.
11	Q Then you were married?
12	A Was.
13	Q You were?
14	Λ Yes, 1 was.
15	Q And were you married at the time John Keene
16	or Joe Kelly arrested you?
17	λ Yes.
18	Q How did you meet Joe Kelly or John Keene?
19	A I met him through another collector.
20	Q And what was that collector's name?
21	A Joseph Luongo.
22	Ω Luongo?
23	A Yes.
24	Q And was he a friend of yours?
25	A Friend? No. Acquaintance, yes.

1	ındlt 17	Costabile-cross
2	Q	Did he bring you together with Kelly?
3	A	Yes.
4	Q	Do you know now that Luongo was an
5	informant for	the government?
6	Λ	I have known that for over a year, sir.
7	Q	But you didn't know it at the time Luongo
8	brought you o	ver to sell a gun to Kelly, did you?
9	A	No.
10	Q	What crime were you arrested for when Kelly
11	apprehended y	ou?
12	Λ	An awful lot of them. I don't know the exact
13	charges, but	there was quite a few.
14	Q	low many charges did Kelly make against you?
15	Λ	I don't know the exact number. There are an
16	awful lot of t	them, though.
17	Q M	More than ten?
18	Α 1	would safely say.
19	1 Q	low, after Kelly arrested you could you
20	give us the da	te of that arrest?
21	A J	uly 18, 1974.
22	Q W	here did he take you for interrogation?
23	. A 1	nitially we went to the Yonkers Police
24	Station for fi	ngerprints and mudshots, and personal history
25	statement, the	n we went to the ATF Headquarters in White

1	mdlt 18	Costabile-cross
2	Plains for fi	arther mugshots and waiting for Luongo to come
3	down.	
4	Ω	Waiting for what?
5	Α	For Luongo to come down to ATF Headquarters.
6	Q	At what point dil you give Kelly a statement
7	Confessing to	the crimes that you allegedly committed?
8	Λ	July 18th.
9	Q	The date of the arrest again was what?
10	Λ	July låth.
1	Q	So you gave him the statement on the same
12	day?	
13	Λ	Right.
14	Q	Did Kelly, in talking to you, tell you that
15	you could go	to jail for a long period of time?
16	A	It was brought to my attention.
17	Q	Did Kelly make any mention of your wife at
18	that time?	
19	۸	No.
20	Q	Did Kelly ask you were you kept your guns and
21	how many guns	s you had?
22	A	No.
23	Q	What did Kelly ask you?
24	Α	He didn't ask me anything. I put down on
25	paper the tru	ith which pertained to my incidents.

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1	mdlt 19 Costabile-cross
2	Q Did Kelly promise you anything if you con-
3	fessed?
4	A No.
5	Q Did you at that point volunteer to him that
6	you became an informant for the United States government?
7	A It was not confirmed until the next day. It
8	was suggested, but, no, I did not tell him I would at that
9	moment. No.
10	Q Who suggested to you that you become an
11	informant?
12	A No one suggested it to me. I made that
13	decision solely on my own.
14	Q As a patriotic gesture, or what?
15	A No, to save myself.
16	Q To save yourself?
17	A Well, I would much rather plead to one charge
18	than the number they had against me.
19	Q Who told you you could plead to one charge?
20	A There was no guarantee of that.
21	Q Did anyone tell you you could plead to one
22	charge if you became an informant?
23	A Mr. Gold, all he said was he would speak with
24	the Judge, which happened to be on the bench, and there
25	was no promises with respect to my pleading to one charge,

1	mdlt 20 Costabile-cross
2	five charges, or any number of charges. All he said was
3	this is what he will try to do.
4	Q When did you speak to Mr. Gold and when did he
5	say that to you, what date?
6	A July 19th.
7	Q A day after you were arrested?
8	A Yes.
. 9	Q Now, Mr. Gold you saw him in this courtroom
10	sitting here, did you not?
11	A In the courtroom, no, but I have seen him
12	today.
13	Q Have you seen him today?
14	A I saw him walking through the halls.
15	Q When you were interviewed by Mr. Gold, on
16	July 19th, was it?
17	A Right.
18	Ω What did Mr. Gold say to you?
19	A First off he told me I didn't have to tell them
20	anything, I didn't have to speak with anybody
21	Q Speak up.
22	A He told me that I didn't have to talk to
23	anybody that I didn't want to, that I didn't have to make
24	any statements that I didn't want to. He specified the

charges against me, which I don't recall exactly what

1	mdlt 21 Costabile-cross
2	they are. He and Agent Kelly were present in his office
3	at this time.
4	Q Would you speak up, please?
5	A Mr. Gold, Agent Holly, and I were present in
6	Bob Gold's office at the time.
7	I asked about reimbursement myself, because I
8	really wasn't about to pay the bill for this. And you
9	Q You asked for reimbursement?
10	MR. LITTLEFIELD: Your Honor, the witness was
11	answering the question.
12	THE COURT: Let him answer the question.
13	MR. LITTLEFIELD: And could Mr. Diamond ask your
14	Honor to direct him to speak up, instead of these instruc-
15	tions to the witness to speak up himself.
16	MR. DIAMOND: I can't hear him, your Honor.
17	THE COURT: All right.
18	I think everybody wants you to keep your
19	voice up.
20	THE WITNESS: I will scream for them, how's
21	that?
22	THE COURT: All right.
23	A (Continuing) The charges that were brought
24	against me were revealed to me by Mr. Gold. All he said
25	was if I cooperated with the government he would make an

1	mdlt 22 Costabile-cross
2	attempt to have me plead to one charge, possibly conspiracy
3	and that he would speak with the Judge that was on the
4	bench.
5	After that I questioned him as far as reimburse
6	ment for any expenses that I would come across, and he said
7	that Agent Kelly would pay me for any expenses, period.
8	Q: Mr. Gold, did he come on very hard with you
9	and tell you you have a lot of charges here, you may go to
10	jail for eighty years, or anything to that effect?
11	A Quite the contrary.
12	Q He came on easy?
13	A I wouldn't say easy. I would say he was a
14	normal speaking person.
15	Q Did he tell you what the result of a convic-
16	tion on each of those ten or more counts could bring you in
17	jail?
18	A No.
19	Q He didn't tell you how long you could go to
20	jail?
21	A No.
22	Q Did you ask him?
23	Λ 110.
24	Q You didn't care?
25	A (No response.)

1	mdlt 23	Costabile-cross
2	2	You didn't care at that time?
3	Λ	I wouldn't clarify it in that category.
4	Q	When you spoke to Mr. Gold, were you worried
5	about going	to jail?
6	A	I don't think anybody relishes the idea of
7	going to jai	1.
8	Q	I didn't ask you that.
9		Were you worried about going to jail? You.
10	Λ	I'd have to say yes.
11	° Q	Were you worried about going to jail for a
12	long time?	
13	Α	I don't know how the period of time so
14	I couldn't p	ossibly state that.
15	Q	Did Mr. Gold say you might go to jail for a
16	long time?	
17	Λ	He never used the term "long time."
18	Q	Did he say short time?
19	Λ	He did not use the term "short time."
20	Q	Did he say you might go to jail?
21	Λ	Yes.
22	Q	And then did he ask you to become an informant?
23	Λ	No, he, in essence, pointed out, I suppose you
24	can call the	m benefits to me by doing such.
25	Q	When Mr. Gold asked you to be an informant,

1	mdlt 24	Costabile-cross
2	did he tell	you how long you would have to be an informant
3	A	No.
4	Q	Did you know at that time how long you would
5	have to be a	n informant?
6	Λ	No.
7	Q	How many times since that date in July of
8	1974, have y	ou been an informant for the government?
9	Λ	Are you asking how many cases have been
10	made?	
11	Q	Yes.
12	Λ	In excess of twenty.
13	Q	In excess of twenty.
14		What do you do for a living, Mr. Costabile?
15	Λ	am an electrical engineer.
16	Q	And is that a full time job?
17	۸	Excuse me?
18	Q	Is that a full time job?
19	Λ	Yes.
20	Q	Where do you work?
21	A	In Connecticut.
22	Q	For what kind of company?
23	Λ	Your Honor
24	-	THE COURT: What kind of company? I will
25	let him answ	er that.

1	mdlt 25 Costabile-cross
2	A For a utility company.
3	Q Have you been an informant is that a full
4	time job?
5	A Yes, it is.
6	Q Now, will you explain where you got the time
7	to be on twenty cases if you're on a full time job?
8	A Certainly.
9	I graduated college June 3, 1975. I was not
10	an electrical engineer. I was a student, a college student
11	during practically all the cases. I stayed up until 2,
12	3, and sometimes later in the morning so I could, as you
13	put it, be an informant for the government and maintain a
14	dean's list status. That's where I got the time.
15	Q So that in addition to being a full time
16	student, you were a full time informant for the govern-
17	ment that is, as much as they wanted you to be and
18	you still made the dean's list is that right?
19	A I was a full time student, and I would have to
20	say a part time informant. Whenever information happened
21	to come my way.
22	Q When information did come your way, what
23	would you do?
24	A What would I do?
25	Q Don't repeat the question. Just answer it.

1	mdlt 26 Costabile-cross
2	THE COURT: I will let him answer it any way
3	he wants.
4	THE WITNESS: Thank you, your Honor.
5	A I would just let whoever the information was
6	coming from talk, because eventually they would talk
7	themselves right into trouble.
8	I asked for nothing. Everything was offered.
9	Q Now, would you get most of this information
10	by the telephone?
11	A I'd say probably a good percentage of it.
12	Q And when you would talk to Smith or any of
13	these other people, would you write down what they were
14	saying as they said it?
15	A Oh, definitely.
16	Q You did?
17	A Only the pertinent parts.
18	Q The pertinent parts.
19	Were you working at the time you were going to
20	school and being an informant?
21	A I was going to school under the GI Bill of
22	Rights. I didn't have to work.
23	Q From the time you became an informant for the
24	government, until the present date, how much has the govern-
25	ment paid you in expenses?

1	indlt 27 Costabile-cross
2	A I don't know the dollar figure.
3	Q Take a guess.
4	A I would never swear to it, but I would say
5	maybe 7, 8 hundred dollars.
6	Q How would you receive payment? By check?
7	A It varied, in various forms. If I had to
8	drive to a given designation, I would fill my tank up
9	prior to leaving Connecticut, I would fill it up again
10	after we got completely done, which took care of the gas
11	situation.
12	If it happened to go into a meal, well,
13	usually the government bought a hamburger or hotdog, just
14	something to sustain me.
15	I was given cash once, I believe, no,
16	a couple of times, for telephone bills, and a couple of
17	times it was in the form of a check.
18	Q Would you submit vouchers for each of these
19	items?
20	A Would I?
21	Q Yes.
22	A Would I or did 1?
23	Q Did you.
24	A No.
25	Q You just told them something and they paid

1	mdlt 28 Costabile-cross
2	you?
3	A I gave them the telephone bill.
4	Q You gave them the telephone bill. Did you
5	give them receipts for your restaurants, for your trans-
6	portation and other things?
7	A For a 30¢ hotdog?
8	Q For anything.
9	A No. They put it on the credit card, the
10	gas credit card to take care of the gas.
11	Q Did you have a gas credit card?
12	A Definitely not.
13	Q In the course of your being a government
14	informant, did Agent Kelly instruct you on how you should
15	handle, how you should deal with your intended victims?
16	AR. LEVINE: Objection, your Honor, as to
17	the characterization.
18	THE COURT: Yes. Take out the characteriza-
19	tion.
20	Did he instruct you on how to handle yourself?
21	THE WITNESS: About the only thing he ever
22	said was "Don't make, or don't talk anybody into doing
23	anything they wouldn't normally do." Beyond that, there
24	was no instructions. I never sat down with him and went
0-	

over anything.

1	mdlt 29 Costabile-cross
2	Q Well, didn't he tell you how to get the
3	confidence of these people?
4	A No.
5	Q Didn't he tell you how to become friendly
6	with them, and make them feel that they could depend upon
7	you?
8	A No.
9	Q You knew that all by yourself?
10	A All by my lonesome.
11	And while you were doing these things, you
12	were deceiving these people, weren't you?
13	A I was acting in the capacity of an informant.
14	Q And in the conversations you had, where you
15	asked Mr. Dobranski to give his address to you, that was
16	for the purpose of getting evidence on him, wasn't it?
17	.A That was for the purpose of sending him a
18	bullet in the mail. He didn't have to give me his address.
19	Q Did you know at that time that sending a
20	bullet in the mail was a federal crime?
21	A I don't know if it is or it isn't.
22	Q Did you tell Agent Kelly that you were going
23	to send an explosive bullet through the mails before you
24	sent it?
25	A Yes.

1	mdlt 30	Costabile-cross
2	Q	And did he tell you it was all right?
3	Λ	Yes.
4	Q	What was your purpose in sending the bullet
5	to Dobranski	
6	Λ	He wanted it.
7	Q	Just like that, he just wanted it and you sent
8	it?	
9	Λ	Sure.
10	Ω	Did you do it as a friendly gesture to him
11	or did you do	o it to get evidence on him so that you could
12	nail him in	this courtroom?
13	. Λ	He brought up the topic of collecting 9
14	millimeter an	mmunition. I said I had two very unusual,
15	unusual, unus	sual bullets, one of which I didn't need.
16	If he wanted	it, it's his, and he said yes, he would like
17	it.	
18	Q	Yes, Mr. Costabile, but you were a federal
19	informant at	all times that you were with him, is that so?
20	Λ	Yes.
21	Q	On the federal payroll, at least with respect
22	to expenses,	isn't that so?
23	A	Solely with respect to expenses.
24	Q	Solely with respect to expenses.
25		And yet you volunteered a friendly act of

1	mdlt 31 Costabile-cross
2	sending him a bullet for no purpose other than befriending
3	him, is that what you're saying?
4	A What's wrong with that?
5	Q Is that what you're saying, that you did it
6	as a friendly gesture?
7	A That's what I'm saying.
8	Q Just to help him out as a collector.
9	A Why not?
10	Q Other than sending Mr. Dobranski a bullet as
11	a friendly gesture, did you perform any other friendly
12	gestures for either of the defendants?
13	A I would say no. And I wouldn't call it a
14	friendly gesture. I wouldn't put it in quite that category
15	I would call it a gesture of keeping up an appearance that
16	had to be set.
17	9 So it was for the purpose of deceiving him,
18	wasn't it?
19	A I don't use the word deceiving.
20	Q What word do you use?
21	He wanted the bullet. I sent him a bullet.
22	There was no friendship felt whatsoever, no deceit intended.
23	And not for the reason of getting his address.
24	Q But it was for the reason of keeping his
25	confidence, wasn't it?

		J0 <b>a</b>	1,11
1	mdlt 32	Costabile-cross	
2	Λ	(No response.)	
3	Q	Wasn't it?	
4	Λ	(No response.)	
5	Q	Wasn't it?	
6	Λ .	I would say yes.	
7		MR. DIAMOND: No further questions.	
8		* * *	
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1	mdh 22	contabile-cross
2	Α	No.
3	Q	They just helpfully showed this supposed collector
4	of machin	ne guns how to operate a machine gun?
5	٨	Yes.
6	Q	And nobody raised any question about him being
7	fuzz or	the man, or anything just other than a collector
8	of machin	ne guns, is that right?
9	А	That's correct.
0	Q	Was obtaining Mr. Dobranski's address strictly
1	your own	1dea?
2	Α	Yes.
į.	Q	Nobody had discussed that with you in advance?
4	Λ	It was on the spur of the moment.
5	Q	Did it occur to you that that might be a helpful
6	plece of	Information to the government, to have Mr.
7	Dobranski	's address?
8	Α	It occurred to me.
9	Q	You mentioned the use of a gas credit card,
20	Ι belleve	. Is that right?
21	Λ	I never used a gas credit card.
22	Q	Mid someone use it to pay for gas that was put
23	into the	tank of your car?
24	٨	Agent Kelly.
25	Q	Am f right in this, that in discussing that

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## Costabile-cross

2 supposedly from anybody in this case or from other people?

- A Other cases. Another case.
- 0 Not in this case?
- A Blight.
- Q Are you sure you told Agent Kelly that you were going to mall this O millimeter cartridge to Mr. Dorbranski before you mailed it?
  - A Yes.
- O And is that a cartridge capable of being fired out of a gun?
- A Personally -- may I interject something personal here, your Honor.
- THE COURT: Go shead. If it is in response to the question.
- A The cartridge dasing, the shell casing itself, was 0 millimeter. The bullet, the projective, was an unusual caliber.
- Q An unusual what?
- A Carter, One in which I have never seen before. The story I got when I was given these two bullets was that they were made up is hollywood. I don't know that to be a fact. That's the story I got. To the best of my knowledge, there is no run commercially made that would shoot that bullet. It may seat in a millimeter gun, but it would

1 mith 26 Costablie-cross be very unsafe to shoot. 2 3 Q So to the best of your knowledge it would take some specially manufactured gun to shoot it, is that right? 4 A It would take a specially -- a gun with a specially 5 6 manufactured barrel. 7 O And you mailed this to Mr. Dobranski a few days after the September 1st Incident? 9 A f believe the following weekend. 10 Q And you were present on October 5th at Smith's 11 apartment when everybody was back together again, is that 12 right? 13 A Yess. 14 And did Mr. Dobranski thank you for sending him 15 the cartridge? 16 A He acknowledged that he got It. He and I were 17 discussing it in the living room while Agent Kelly had gone 18 into the bedroom where Mr. Dwyer and Mr. Smith were. He told me what it was in his opinion, which I wasn't really paying 20 attention to what he told me that it was. 21 He seemed to be interested in it? | | | () I would say yes. A 23 And grateful to you for sending it to him? 24 A He never specified. 25 You asked nothing in retyrn for it, is that right?

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SOUTHERN DIS. HCT COURT REPORTING U.S. COURTHOUSE

1	malt 2 Costabile-redirect/recross
2	direct quote that I can recall.
3	In some cases, like I have quotation marks
4	around "Jim type carrying bag," with reference to Mr.
5	SMith, this is only something to remind me that that was
6	exactly what it was.
7	There's notes written in here which you
8	almost have to be an engineer to understand, and I don't
9	want them interpreted the wrong way.
10	Q Mr. Costabile, when Mr. Dobranski showed
11	Agent Kelly how to open the bolt or breach on this PPSH,
12	how long did it take him to do it?
13	A Thirty seconds.
14	MR. LEVINE: No further questions.
15	RECROSS EXAMINATION
6	BY MR. DIAMOND:
7	Q Mr. Costabile, when you told Agent Kelly
8	that you were going to mail a bullet or a cartridge to
9	Mr. Dobranski, did he call your attention to Title 18,
0	Section 1716, which I show you, which makes it a crime
1	to mail poison, insects, reptiles, and all explosives,
2	and defines them, which may ignite or explode and all othe
3	natural or artificial articles or materials which may kill
4	or injure a person.

1	mdlt 3 Costabile-recross
2	a federal crime by mailing that explosive?
3	Λ No.
4	() You haven't been charged with that crime,
5	have you?
6	A Not to my knowledge.
7	MR. DIAMOND: I am looking for the rap
8	sheet, your Honor.
9	(Pause.)
10	Q I show you, Mr. Costabile, as Mr. Boyan did,
11	the offense for which you
12	MR. LITTLEFIELD: I have an objection to
13	this question as outside the scope of the redirect examina
14	tion by the government.
15	THE COURT: I don't know what the question is
16	MR. LITTLEFIELD: It is something about the
17	rap sheet and we have been through that already on cross
18	examination.
19	THE COURT: Let's hear the question.
20	MR. DIAMOND: I forgot the question, your
21	Honor.
22	Well, I'll ask another question.
23	Q Do you remember you said to Mr. Boyan that
24	you thought and tell me if I'm wrong this is what
25	my recollection is, you thought that what you pleaded

1	mdlt 15 Costabile-recross
2	right to see the physical evidence to corroborate what he
3	says and the government says is true.
4	THE COURT: Can you get up another rap sheet
5	fast?
6	MR. LITTLEFIELD: I will see if the agents
7	can do that by tomorrow, your Honor.
8	MR. DIAMOND: That's all.
9	THE COURT: Any other questions?
10	MR. BOYAN: No.
11	THE COURT: All right, step down.
12	(Witness excused.)
13	THE COURT: Do you want to read the letters
14	now?
15	MR. LEVINE: Yes, sir.
16	THE COURT: All right, go ahead.
17	MR. BOAYN: Your Honor, do I understand that
18	the witness will be back tomorrow with the original hand-
19	written notes?
20	THE COURT: I assume that the witness will be
21	back tomorrow. You're not going to get the original hand-
22	written notes. You might get redacted copies of it.
23	MR. BOYAN: So much as is relevant to this
24	case, your Honor. And the Court is directing that?
25	THE COURT: Yes.

1	mdlt 16
2	MR. COSTABILE: They are notes of telephone
3	conversations.
4	THE COURT: I understand.
5	MR. LEVINE: Ladies and gentlemen of the jur
6	I am now going to read to you Government's Exhibits 10,
7	29, 31, and 32, which were received in evidence yesterday
8	MR. BOYAN: May I have an instruction it is
9	not binding upon the defendant Dobranski?
10	THE COURT: I will give a complete instruc-
11	tion at the end of the case.
12	MR. BOYAN: Thank you.
13	(Mr. Levine started to read to the jury from
14	Government's Exhibits 10, 29, 31 and 32, received
15	in evidence.)
16	THE COURT: Ladies and gentlemen, I just
17	noticed the time. It is a quarter to 5, and I promised t
18	get you out at 4:30. My apologies.
19	Mr. Clerk, will you escort the jury from the
20	courtroom.
21	(Jury left the courtroom.)
22	THE COURT: All right, gentlemen, 10 o'clock
23	tomorrow.
24	(Adjourned to December 18, 1975 at 10 a.m.)

\* \* \*

Mr. Diamond, you want to make a motion?

MR. DIAMOND: Yes, sir.

move that the case against Mr. Dwyer be dismissed on the basis of testimony by Mr. Costabile that he, with the knowledge of Agent Kelly, mailed an explosive bullet -- that is, explosive in the form of a live cartridge -- in the mail, to Mr. Dobranski, presumably for the purpose of obtaining evidence in some manner against both defendants, or at least for the purpose of pursuing another investigation in order to obtain further evidence, and in so doing, both men, one a paid federal employee and the other an undercover agent of that federal employ, violated the provisions of Title 18, Section 1716, entitled "Injurious Articles Non-Mailable."

If I may just read that provision, your Honor, for the record, it states:

"All kinds of poison and all articles and compositions containing poison, and all poisonous animals, insects, reptiles and all explosives, inflammable materials, infernal machines, and mechanical, chemical or other devices or compositions which may ignite or explode, and all other natural or artificial articles, composition or material which may kill or injure another or injure the mails, or

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other property, whether or not sealed as first class matter are non-mailable matter and shall not be conveyed in the mail or delivered from any Post Office or station thereof or by any office or employee of the Postal Service."

Your monor, I suggest that this is a federal offense, that the federal agent involved, and their undercover agent, Mr. Costabile, knowingly violated that law in order to obtain evidence or furthering their investigation in this matter.

gnforcing the law, officials of the United States government are not permitted to violate the federal laws, and when they do violate these federal laws in attempting to obtain evidence on a proposed defendant and I suggest since much client Mr. Dwyer is a citizen of this country, he was still presumed innocent and was so at that time an innocent man -- then, your Honor, in so doing, knowingly violating the federal laws which they were duty bound to enforce in order to secure evidence against Mr. Dwyer, I suggest that that is a basis for dismissing this indictment against Mr.

THE COURT: Motion denied.

Mr. Boyan?

Mk. BOYAM: Your Honor, I would like to move

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357 mdlt without any explanation of its absence, with this man admittedly never having owned it or as far as the evidence 3 shows, did nothing but possibly hold it in hand and 4 try to show somebody how to bolt operate it, I think putting 5 all that together, it brings it to a conclusion that it is unfair to John Dobranski to subject him to the risk of 7 being convicted of any of the offenses he is charged in the indictment based on any consideration of this machine 9 10 gun. THE COURT: Motion denied. 11 MR. BOYAN: Also, your beacr, with respect to 12 the other machine gun, there is an absence of proof that it 13 was a machine gun within the definition of the statute 14 at the time it was seized, at the time that the offense 15 16 is charged. THE COURT: My recollection is that there was 17 proof on that, sufficiently proof to go to the jury. MR. LEVINE: Your Honor, one housekeeping 19 20 matter. The government presumes the defendants are 21 prepared to go forward this afternoon. The government has 22 retained the services, pursuant to our order, of Dr. Stanley 23 Portney, who examined defendant Dwyer for criminal 24 responsibility. Dr. Portney is leaving the New York area

358 mdlt tomorrow, and will have to testify at some point tomorrow. 2 The government understands at one point today 3 Mr. Diamond stating that Dr. London may not be able to be here until Monday, and the government would strenuously 5 urge that before Mr. Diamond presses on behalf of his 6 client, the defense of lack of criminal responsibility, 7 8 that Mr. Diamond make an offer of proof on the record, so that there is some evidence of the lack of criminal responsibility before they are permitted to put on lay witnesses on that issue. 11 12 MR. DIAMOND: Your Honor, I didn't say that. 13 I didn't say that the only day he could appear was Monday. I said he preferred to appear Monday, if possible, but he 14 said he would appear Friday. I will do my best, your 15 16 Honor. 17 THE COURT: Okay. Good. See you at 1:30. 18 19 (Luncheon recess.) 20 21 23 24

	1	mmjb 1 - 359
т1.в1	2	AFTERNOON SESSION
_	3	1:50 p.m.
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	5	(Jury in box.)
	6	THE COURT: All right, counselor.
	7	MR. DIAMOND: Mr. Dwyer.
xxx	8	JOHN J. DWYER, SR., a witness called
	9	on behalf of the defendant Duyer, being first duly
	10	sworn, testified as follows:
xxx	11	DIRECT EXAMINATION
	12	BY MR. DIAMOND:
	13	Q Mr. Dwyer, can you hear me in this tone of
	14	voice?
	15	A Yes, I can.
	16	Q Will you state where you live and how long you
	17	have lived there?
	18	A I live at 3963 Park Avenue, Edison, New Jersey.
	19	I have lived there since 1958.
	20	Q You live there with whom?
	21	A My wife and my oldest son, John.
	22	Q Now long have you been married?
	23	A 41 years.
	24	Q How many children do you have?
	25	A Two, my oldest son, John, and my youngest son,
	- 11	

asking us to go back at a grade nigher. So I went in the

Where is he now?

73a
numjb Dwyer-direct 362
A He is in the Marine Corps air station in
Beaufort, South Carolina. He is a pilot of an F-4 phantom.
Q How long has he been a pilot of an F-4 phantom?
A Well, he piloted jets while he was still in
flight training. In other words, when the Navy trains
pilots, Navy trained pilots first go to flight school at
Pensacola. They are in propeller planes. Then they are
advanced to jet aircraft. Currently they fly in pasic
what is called the buckeye trainer, which is a jet, and
then in advanced aining they go to the training version
of the TAJ4 skyhawk. And then after they graduate from
advanced flight school, based on an evaluation, why, they
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He has been flying the F-4 phantom ever since.

Was he on active service, combat service?

are assigned as a fighter pilot in the F-4 phantom.

No, he was not. He was after training stationed at the Marine Corps air station at Kaneone on the island of Oahu. This was at the tailend of the Viet Nam War.

His age bracket brought him to the tailend of the Viet Wam War?

That is correct.

Now, did your son Bob as a phantom jet pilot have any major accomplishments that you know of?

MR, LITCHEFIELD: I thought this trial was

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against John Dwyer. Objection.

MR. DIAMOND: The reason I make this point, because the psychiatric testimony that will come in will show why.

THE COURT: Go ahead. Tell us what he did.

Well, a year ago in April at Beaufort, South Carolina, while returning to his base, there was a mechanical failure, his hydraulic line ruptured, and he could not lower the landing gear. He had a choice of bailing out or trying to bring the aircraft in on its faselage, what they call the wheels up in configuration, and he set it down at the Charleston Air Force base about 100 miles from Beaufort. They had alerted the energency crews and all, but, anyway, the substance of it was that he became the only man so far as is known who successfully landed a phantom in a wheel-up configuration without bending the airplane and killing the crew, and he was decorated for it by the Marine Corps. He received the Marine Corps SAFE award. That stands for superior achievement flying excellence, and this past August the thing was written up in the Navy flight publication, he was given what was called a bravo zulu, a two-page account. It took a lot of guts; it took a lot of top airmanship, and it took a nell of a lot of brains.

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364

uncle Demming, he served as a chief petty officer in the

Mavy in World War I, and I served in World War II.

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Q What kind of toys did you make for him?

the service and had gotten home.

	//8
1	mmjb Dwyer-direct 366
2	A The first one was when the war first started.
3	THE COURT: Do you want to offer these?
4	MR. DIAMOND: Yes, I do.
5	* THE COURT: Do you object?
6	MR. LITTLEFIELD: No.
7	THE WITNESS: I took a piece of rain pipe and
8	a couple of pieces of two by four and I made a mock-up of
9	a Maxim machine gun.
10	Q Is the machine gun depicted in that photograph?
11	A Yes.
12	Q Does it show Jack in various other poses with
13	guns?
14	A Well, those other pactures, this picture here of
15	
16	him, that is a toy gun, but this one with the holster is a
17	Smith & Wesson .38. I had a detail to bring a dead sailor
18	nome for burial and I wore side arms and I managed to get
19	home.
20	That was about a week before I went overseas
21	again. And I gave these to him and he wore it and I took
22	pictures of it.
23	And this one here, that is actually a toy gun.
24	Q So with the exception of the first photograph,
25	the other photographs depict toys?
	A No, no, this is subsequent to the war. You will

1	mmjb Dwyer-direct 367
2	notice he is a couple of years older. I don't know just ho
3	old he was. That is a .22 rifle. I believe it belonged to
4	one of my brother-in-laws.
5 .	Q How old was he when he was pointing that .22
6	rifle?
7	A I can only guess, Mr. Diamond, but I believe he
8	must have been about 10 or 11 years old at the time.
9	MR. DIAMOND: May I pass these to the jury?
.0	(Defendant Dwyer's Exhibit 1 received in evi-
1	dence.)
2	(Defer lant Dwyer's Exhibit 1 given to the jury.
13	THE COURT: You will excuse me a minute.
4	(Pause.)
15	(Continued on page 368.)
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		<b>79a</b> 368	
Take 2 pm	1	mdlt 1	
	2	THE COURT: Ladies and gentlemen, have	you
	3	finished with the pictures?	
_	4	The jury says no.	
	5	Okay.	
	6	(Pause.)	
	7	THE COURT: All right, counsel	
	8	(Pause.)	
	9	THE COURT: Sure, we're all desperately	
- 1	10	human.	
	11	(Jury excused.)	
	12	(In open court - jury not present.)	
	13	THE COURT: I'm sure you gentlemen wonde	er
	14	why I said "We are all desperately human."	
	15	. There are certain biological functions	which
	16	occur in every human being, and one of them needed to	o be
	17	taken care of by one of the jurors.	
	18	MR. DIAMOND: We have another biologica.	1
	19	function to deal with. May Mr. Dwyer be excused?	
	20	THE COURT: Certainly.	
	21	(Recess.)	
	22	(In open court - jury present.)	
	23	THE COURT: All right, counsel.	

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Dwyer-direct

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DIRECT EXAMINATION CONTINUED BY MR. DIAMOND:

O Mr. Dwyer, was there a time when you were overseas that you sent Jack something?

That was when I was in Panama. We had target practice, anti-aircraft target practice, and I took one of the anti-aircraft machine guns and I sent him an empty 50 calibre cartridge after it was fired, and I remember, I guess he was 7 or 8 years old at the time, and 1 got a printed postcard back, "F ar Dad, thanks for the bullet. Now send me the gun."

You had two boys, Mr. Dwyer. Would you describe to the jury what Jack was like, very briefly?

Well, when he was born in 1937, why, he underwent surgery when he was four weeks old and very serious, and we almost lost him, and he was a normal child.

But then when the war started of course the whole country was whipped up into a patriotic fervor, and everybody, children, grown-ups, that's how that picture with the machine qun, which I think probably was the beginning of his interest in anything that was related to war stuff, and it didn't mean anything in particular at that particular time. That was when, let's say, his penchant for collecting stuff began after the war as he

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## Dwyer-direct

grew older, and went into young boyhood, but he was a perfectly normal boy as far as I could observe until about the time his brother was born in 1947.

## O And that's Bob?

A That's Bog. And just about that time Jack sort of, he started to more or less, you know -- I guess you call it turn in on himself a little. In other words, if we wanted to go out to dinner, he didn't want to go, he would stay in his room with whatever things he had, and he sort of -- this wasn't apparent, his withdrawing to me at the time, it was just, well, you know, the boy was being maybe a little obstinate or something like that.

about ten or eleven years old, and I had an aunt and uncle up from Baltimore, and I remember we were going out or going someplace, and Jack wouldn't go, or didn't want to go, and I remember my Aunt Ethel saying, "Jack, people only love you as much as you will let people love you."

In other words, at this point he was being more and more withdrawn, but, as I say, it didn't mean anything to me. At that moment it was only by hindsight about ten years ago that the pieces started to fit together.

o From the standpoint of boyhood aggression,

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Dwyer-direct

physical activity, or combat with other boys, how did Jack compare with Bob? What was the difference?

A Bob was completely outgoing, and aggressive. I don't mean pugnatious. Completely outgoing, completely the -- he is the complete antithesis of his brother. Jack has since he's been a small boy been very quiet. Although he had an excel . 'ocabulary in school and comments from his teachers in notes of his progress and all, he was above average in vocabulary, but he didn't use it. When I say he didn't use it, he was not the outgoing type with his brother ten years later at the same age, let us say.

Bob, from his early boyhood right through his career in high school and college, he was always, in the forefront of student activities, and so on. They were completely different in that respect.

Q Whereas Bob would be active in sports and so forth Jack wouldn't is that right?

That's true. Jack, whatever his particular interests or hobby of the moment might be, whatever it was, this was always all engrossing. Whereas Bob, he was into everything.

Q What kind of father were you insofar as discipline is concerned?

I think you're asking me to hang myself.

Dwyer-direct

I guess I was -- well, I sort of had oldfashioned ideas. In other words, I always felt that boys
in a sense were like little puppies, it was a matter of
reward and punishment. If they stepped out of line, they
got punished, and they were on their toes, why, conducted
themselves proplery, then the necessary rewards. But I was
a strict disciplinarian, I guess that sums It up.

- O Did you ever beat Jack when he was a boy?
- A Well, they both got whipped.
- O How did each one react toward the whipping?

Well, of course when they were small boys,
well, I whipped them for a bad report card, or you whipped
them for -- when I say "whipped," I never smashed them
generally with my hand or anything like that, I don't want
to imply that I was brutal. The standard punishment was
to go into the bedroom, bend over the bed and I would take
my strap and whack them over the butt. I lost of temper,
something I have always been ashamed with with Jack, but
it was more out of fear, more than anything else on my part--

May I last ask you this, and bring it to one incident, and we will not go into many of them, but this one incident when you talk about fear, what was that incident about?

A Jack was about, I believe, around ten years

old, and we were up the street to relatives, my wife's brother's house.

My nephew, that particular nephew, I believe was a year or so older than Jack at the time. He was somewhat bigger, and usually in the pecking order of kids, why, he sort of crowded over Jack.

Anyway, I remember he knocked Jack down. Jack just lay there and wouldn't get up. And when I saw it I was really shook up, and I remember I yanked him up by his collar and rushed him down the street, we lived about six or seven houses down the street, and I really whipped him, and I said, "If you get knocked down don't you ever lay down, get up and fight."

O Was Jack a fighter? Would be fight back?

A I didn't have an opportunity to observe him too often in relation with his peers, so to speak, so I don't know. I really don't know. This is something that occurred right in front of me, you see.

Q What caused you to do that -- that is, to beat him?

A Well, I guess it was back to my own boyhood, when I was growing up I was sort of a -- I was about two years younger than most of the kids in my gang, you would call it. I had shapped two grades in school. I had never

Dwyer-direct

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gone to kindergarten, so I was two years younger than the fellows I was growing up with from third grade on up, you see, and kids can be pretty brutal to each other.

Kids once a pecking order is established, the guy at the end of the heap, he takes a good deal from the bigger and older kide and if you happen to lose a fight it is bad, and if you don't tight at all, it's worse.

Along the line I quess I took quite a bit of punishment both one way and the other, and when I reviewed when my sons were born, the deathly fear -- I should say deathly fear, but I just dign't want them to undergo what to me was the mental punishment, the physical punishment, of being licked in a fight. I wanted them to fight back all the time, never avoid it, because I realized later on the worst thing you can do as a kid is not to fight back. I didn't want them to go through mental punishment that kids can inflict on let's say weaker kids.

- How did you regard winning? MR. LEVINE: Objection, your Honor. Can we approach the side bai? THE COURT: No. I will permit him to go on.
- Such things as courage, and winning, what did that mean to you insofar as your discipline of Jack was concerned?

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4	-			

A Well, I wanted Jack, and I wanted my younger son — in other words, to face life and not necessarily be a winner, but hold their own with the rest of the people. I don't mean the material things, but to hold the respect. First of their own self respect and the respect of others, and such weaknesses as I felt I had, I didn't want to happen to them.

O As Jack grew older, did he begin getting involved in any singular interest?

A Well, this collection of firearms started directly -- I mean where he started to acquire them, started directly probably when he was about, oh, about 12 years old, where he was able to purchase himself, because that would be in 1949, the first year that I opened this small business that we had, what you call a drive-in hotdog stand where you have car hops and even at 12 years old he worked for me.

He got tips on the trays. I didn't know at first what he was doing, but it turned out that he was either buying these mail order rifles from different places, the \$10.98 stuff, the surplus stuff, and he started to collect them.

I was working and my vife were both working at this small business, we worked seven days a week, and we

	0/8
1	mdlt Dwyer-direct 376
2	didn't get home until after midnight, and a lot of things
3	probably that I should have, you know, observed and
4	possibly stopped if I could have, I didn't.
5	O What kind of boy was Jack insofar as involved
,	with the authorities was concerned? Was he ever a
7	trouble maker, in trouble?
8	A No, sir, no.
9	O When was the first time he ever had trouble
10	with the law?
11	A He never had trouble with the law.
12	Q This is the first time, is that right?
13	A He never had trouble with the law.
14	O How old was your Bob when he got married?
15	A Bob?
16	O Yes.
17	A 22. He was married the week after he
18	graduated from college. I believe he was 22 in January,
19	the year that he graduated from college, and the girl he
20	had been engaged with, why, they were married a week after
21	they graduated.
22	Q How old is Jack now?
23	A Jack is 38.
24	O Has Jack ever been married?
25	A No.

1	mdlt	Dwyer-direct	377
2	Q Wi	th the exception of thi	s paraphernalia
3	of World War II	which we are bout to q	et into, did Jack
4	have any other	interests?	
5	A We	ight lifting and cats.	•
6	O Wh	at was his well, who	n you speak about
7	cats, what are	you saying?	
8	A Si	r?	
9	, Q' Wh	at are you saying, that	he loved cats?
10	A He	loved gits from the ti	me he was a very
11	small boy, in fa	act, in the period thos	e pictures were
12	taken, there is	another picture in the	album at home, he
13	is with the lit	tle kitten and it's a s	well picture, but
14	always he had a	penchant for cats. He	's got six of them
15	now. Strays, th	nat he feeds.	
16	Q As	ide from the animals, d	id he socialize
17	even up to now t	with people, going out	with people, or go
18	to movies?		
19	A Fro	om tire to time he would	d yo out with a
20	girlfriend, but	I remember remarking or	ne time I guess he wa
21	probably address	sing his mother he could	d never afford his
22	hobby and girls	too, so it wasn't too s	serious.
23	Q You	mean he gave up girls	for the habby, is
24	that right?		+
25	A Yes		

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1	mdlt	Dwyer-direct	378
2	Q	Had Jack been in the service	, too?
3	Λ	Yes.	
4	Q	How long was he in mervice?	
5	Λ	In the Air Force for four year	ars and six
6	months. Th	e initial enlistment was for fe	our years and the
7	he extended	it for six months.	
8	Ω	Did he have any medical or ps	sychiatric
9	problems, t	o your knowledge?	
10	Α. Α	He did.	
11		I learned about it quite a go	ood deal after
12	the fact, bu	ut he did.	
13		MR. LITTLEFIELD: The governm	ent objects to
14	psychiatric	problems this man had in the m	
15		THE WITNESS: It is in the re	cord.
16		THE COURT: Overruled.	
17	Q	Did your son ever visit any p	sychiatrist?
18	Λ	He was treated by a psychiatr	ic counselor wher
19	he was in th	e Air Force. It is in his dis	charge record.
20		I learned about it.	
21	0	Do you know what the nature of	that was?
22		MR. LITTLEFIELD: I would obje	ect to what he
23	learned abou	t in his discharge record. It	is hearsay.
24		theory under which it is admiss	
25		THE COURT: It certainly is.	

1	mlt Dwyer-direct 379
2	Ω Did you ever discuss with Jack his
3	psychiatric history in the military?
4	MR. LITTLEFIELD: Objection, your Honor.
5	THE COURT: Whether he discussed it with his
6	son? No. Go ahead. Answer it.
7	Q Did you?
8	A Yes.
9	At the time he was being treated by Dr.
10	Stewart about nine years ago.
11	Q Who is Dr. Stewart?
12	A Dr. Paul Stewart of Union and Perth Amboy,
13	New Jersey, and he was a psychiatrist that Jack was under
14	treatment with for quite a period of time for extreme
15	depression.
16	Q Is Dr. Stewart still living?
17	A No. Dr. Stewart died a few years ago.
18	Q Under my instructions, did you make any attempt
19	to get his records?
20	Λ Yes, I did.
21	0 Were you successful?
22	A No. I pursued it through I think it's
23	called the Union County Psychiatric it's like the
24	county medical association, only it's psychiatrists, and
25	all they were able to develop was that Dr. Stewart's wife

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1	· mdlt Dwyer-direct 380
2	had apparently left the area and they believed she lived up
3	in the vicinity of Cape Cod.
4	THE COURT: All right, you couldn't get the
5	records.
6	Q You were unable to get them, is that right?
7	A I was unable to get them.
8	Q Mr. Dwyer, did you ever have any discussions
9	with Dr. Stewart, the psychiatrist?
10	A Yes, I did, at his request.
11	Q As a result of those discussions with Dr.
12	Stewart, who is now dead, did you learn anything about
13	Jack?
14	A Yes.
15	MR. LITTLEFIELD: Objection, your Honor.
16	THE COURT: No. Whether he learned it or not,
17	the answer is yes.
18	Q As a result of what you learned, did you
19	treat Jack any differently or did you show regularity or
20	readjust your attitude toward Jack?
21	A Yes.
22	Q What did you do and why?
23	A -Dr. Stewart warned me not to
24	THE COURT: No, what did you do, first?
25	THE WITHESS: I no longer tried to pressure
	him in any respect.

		20
т3.В1	1	mmjb 1 Diver-direct 381
	2	Q How old was Jack at that time?
	3	A At that time, in the area of 28 or 30.
_	4	Q And why was that that you did not try to pres-
	5	sure him?
	6	A Because Dr. Stewart instructed me under no
	7	circumstances to put any pressure on him.
	8	O Mhy?
	9	A He said that
	10	MR. LEVINE: Objection.
	11	THE COURT: Yes, hearsay. Sustained.
	12	Q In light of your conversations with Dr. Stewart
	13	and in light of your own personal observations of Jack,
	14	did you readjust your attitude and conduct towards him based
	15	upon any fears that you had?
	16	A Yes, I did.
	17	Q What was that fear?
	18	A The fear that I would damage him irreparably
	19	mentally.
	20	Q And what do you mean by that, without quoting
	21	Dr. Stewart?
	22	A If I had put pressure on him it was possible
	23	that he would retreat even further into his own mind, and
	24	so to speak, go over the brink where he could not be brought
	25	BEST COPY AVAILABLE

2 Q He would become totally insane? Is that what 3 you are saying?

A I don't know whether the term is insane, Mr. Diamond. It would blacken out the whole world, in other words, retreating from pressure within nimself where in a sense he would become a vegetable.

Q Mr. Dwyer, did you ever criticize Jack for collecting these items of war to the exclusion of other activities?

A Yes, I did.

Q And during all that period of time were you able to change his mind about these things?

he was about ten years old he gradually sort of shut off from me, he had a passive resistance. In other words, little by little I really lost contact with him; I could not get through to him and it became most pronounced after he came out of the Air Force. It was in a sense as though I were a complete stranger; we lived together in the same house, but in 20 years he has never even addressed me as father; he has this thing against me, which is probably due to the pressures that I had put on him when he was a small boy, not realizing that he had a mental problem in the two forces coming together, and probably I created a

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walls, he has on shelves, on racks and on stands and hanging from the ceiling, and the last part of the basement, which is the furnace room, also the tool room, there is where he does the actual work in fabricating, and in that part of the basement where he also has his weight lifting equipment, he has shelf after shelf of books.

What kind of work does Jack do?

A Very meticulous work; he is a sticker for detail; he has a tremendous amount of patience for the firest type of work. You mean what kind of work does he do for a living?

Q With respect to these models. Did he put them together himself?

A Yes.

Q Did he permit anybody to put them together for him?

A No.

Q Now, his occupation, what is his occupation?

A He is a machinist.

Q Do you know why he became a machinist?

A Well, originally he got the job about a year after ne got out of the hir Force. There was a sort of one of those recessions at the time, and there is the

Charter Machine Company in Me John and one of the owners is Mr. Jertes. I had sold him an airplane that I had owned, and he dame into my place one day and I asked him if he could give Jack a job.

Air Force he was in air police. So he was not trained for anything on the outside. And he started off just as a laborer. He was a big man and he could tote steel bars and various things, and little by little he learned to be a machinist, and now he is rated as a machinist. I don't think you would call him a master machinist, but I have asked him why he stays at that work.

And over the years he has been able when he has to to make fittings and what-not after hours. I think that is his principal reason for staying.

On the average how much does he earn?

A I have no idea, Mr. Diamond. My son never told

Q Do you know whether Jack has any savings?

A If he has any savings over the years, it was very little, because his first car--I should not say his first car; the first car was a \$200 jalopy I bought him after he came out of the Air Force--but his first car was a '62 Chevrolet. I financed it. He paid me back over a couple of

me what he earns.

25

Holsters

1	mmijb Dwyer-direct 387
2	Q Were these also in the basement?
3	A Yes, dozens of those things.
4	Q Now I am holding in my left hand a book with
5	Japanese or Chinese characters in it and a book entitled
6	The Pacific War Art Collection. Were these in Jack's
7	library?
8	A His library encompasses not only books in English
9	but he collects books, comparable books that were published
10	in Japan and written in Japanese, published in Germany and
11	written in German, and probably some Italian. I'm not
12	sure about the Italian.
13	Q How many books altogether did he collect?
14	A I am trying to visualize the book shelves in
15	the basement that he has. He has them all indexed. They
16	apply to the French Foreign Legion, to this and that and
17	that. They would excend for approximately 12 feet, and I
18	believe there are five rows of them, and I have read some
19	of those books, and I find some of these interesting history
20	books.
21	Q I show you a book and it says Japanese Hand
22	Guns. Is this one his books?
23	A Oh, yes.
24	Q And this is Mauser one of his books?
25	A Yes.

1	mmjb Dwyer-direct 388
2	Q And Small Arms of the World?
3	A Yes, that is an expensive book.
4	Q And Pictorial History of the Submachine Gun,
5	is that his book?
6	A Yes, and there are duplicates, not the same
7	book, but different authors, different publications on the
8	same subject.
9	Q Did Jack ever read any other books?
10	A Well, once in a while he reads a novel, I sup-
11	pose. He is an expert on anything you can name regarding
12	military equipment, going back to the Civil War and even
13	back to the Revolution.
14	Q I Thow you a photograph of Mussolini, one of
15	Hitler and another of Tojo.
16	A I think he has them of Stalin, all the war
17	leaders, major war figures in World War II in particular.
18	Q Does he have busts of these figures?
19	A I think he has busts of all of them, yes. I
20	don't know whether he has Stalin or not.
21	Q I show you a sword, a scabbard. Did he have
22	many of these around?
23	A On, yes, from all of the different services,
24	Samarai swords; he has even got these swords that the
25	desert Berbers or whatever they call them in Africa,

Dwyer-direct inmjb 339 1 actually nandmade stuff. But these are collectors' items, 2 Mr. Diamond; some of them are pretty valuable to collectors. 3 Q I show you some items out of a box marked DW-4. 4 This helmet, is this one of Jack helmets? 5 6 A lie has just about any helmet you can name from 7 any nation. 8 Q Did he trade and sell these and so forth? 9 A Well, from what I have observed and what I can 10 learn on these people that engage in this nobby, they set 11 up like a flea market in different places from time to 12 time. They buy and sell and collect. 13 But the idea is to acquire something they have 14 not got or something that is more sought after. I suppose 15 it would be like collecting postage stamps. 16 And this head with the helmet, is this one of 17 the helmets? 18 A Yes. 19 O Do you know why he put them on these model 20 neads? 21 A I don't know, but I do know that he has down 22 in the basement mock-ups he made. He tried to buy these 23 store dummies that they display clothes and dresses on, but 24 he could not get those, so he fabricated a full articulated

outline of a person and he had one with a full German

**B3** 

pasement?

Dwyer-direct

	A	Mr.	Diamond	, wnat	you	have	in al	1 that	stu	ff
there	presen	nts p	probably	less	than	a qua	arter	of his	tot	al
colle	ction.	We	brought	this	stuf	f in a	a pick	up tru	ick t	oday.
It wo	ald be	impo	ssible	to get	it	in, al	ll in	in two	or	three
truck	S .									

- Q This is only a small portion?
- A Yes--uniforms, medals, you name it, ne has it.
- Q I am showing you now some items from DW-4. Do you know what that is?
  - A That is a United States Marine Corps flag.
  - O Did Jack have that displayed in your basement?
- A Yes. Bear in mind that it was impossible to display everything, but that was displayed down there on the wall.
  - O What about these?
- A They are somebody's combat boots, but I don't know who. He has all kinds of combat boots.
  - Q He collected them?
  - A Anything relating to military equipment.
- Q And again from the same box I show you these.

  Can you see these items from here?
- A They are military insignia for officers or enlisted men. I guess he has a collection from just every country or power, military forces.

 Did he actually designate what each and every emblem was?

A Generally, as far as I can recall. He has a vast collection, Mr. Diamond. I have seen only a small part of it. I know it is there, because I move the boxes around, because it is impossible to display everything. He put the choicest things on the walls in frames or on display.

Q Going to DW-6--I am not going to each and every item, Mr. Dwyer--but just as examples.

A I think that is the Don't Tread on Me flag.

I think that is one of our colonial flags, Don't Tread on Me. That was before we had a national emblem during the Revolution. We had the Pine Tree flag and the Don't Tread on Me flag, different banners like that.

Q He collected those?

A Yes, sir. That, of course, does not date back to colonial times, Mr. Diamond. That is a replica.

This is from the German Navy, but I am not sure.

Q Is that from World War II?

A Yes, it probably would be World War I, World War II--I don't know.

Q How does Jack to your knowledge feel about people who are handling this?

1	mmjb Dwyer-direct 393.
2	A Don't touch it.
3	Q Has he ever forbidden you?
4	A You cannot touch the stuff; nobody can touch
5	that stuff.
6	Q You were here yesterday or the day before when
7	I asked you to pick up the stuff. Did he say something to
8	you about touching it?
9	A You might break it or something like that; don't
10	touch it.
11	Q Now, can you see from there these medals?
12	A I believe that is every decoration that our
13	Armed Forces give. I think that collection is complete,
14	including the medal of honor, the blue ribbon. I don't
15	know whether that is an Army or Navy medal of honor; he
16	may have both. They are slightly different in configura-
17	tion.
18	Q I am only taking a few of the items out, Mr.
19	Dwyer. I show you what appears to be a bayonet.
20	A That is a French knife. I think that goes back
21	to World War I. I believe that goes back to World War I.
22	Q This was Jack's?
23	A Yes.
24	Q And this?
25	A This is a form of machette. I don't know where

- 1	
1	mmjb Dwyer-direct 394
2	that would come from, but it is used in the jungle, I
3	guess.
4	Q And that?
5	A Hold it sideways. It would probably be a form
6	of combat knife, but I'm not sure, Mr. Diamond. It is no
7	necessarily ours, it might be some other armed force. There
8	are bayonets, there too.
9	Q Does this form only a small part of the collection
10	of bayonets?
11	A Overall. I would not say this is a small part
12	of the bayonets, Mr. Diamond, but I say I don't know exactly
13	how many various kinds. I don't have too much interest in
14	them myself.
15	Q I am not going to take the time to pull them
16	all out.
17	I snow you what appears to be a hat with a
18	skull and crossbones on and a Nazi swastika.
19	MR. LEVINE: I object at this point. If Mr.
20	Diamond wants to have the witness identify all of these
21	items as part of a collection of his son's, that is fine.
22	I don't think he is right now prepared to qualify Mr.
23	Dwyer as an expert on World War II memorabilia, and I
24	think we have gone far enough.
25	MR. DIAMOND: I withdraw the question.

	100a
1	mmjb Dwyer-direct 395
2	Q Do you remember these items being in your
3	nouse? I show you a box or items out of a box
4	MR. LEVINE: Your Honor, once again the Govern-
5	ment makes an objection. If he wants to bring the box to
6	the witness, have the witness identify the contents of the
7	box, the Government has no objection to the box going in
8	evidence.
9	, MR. DIAMOND: I will be glad to do it.
10	Q Will you look at the contents of this box, sir,
11	A They are insignias. Yes, that is part of the
12	collection.
13	THE COURT: Do you want to offer it, counsel?
14	MR. DIAMOND: Yes, I offer all the items.
15	MR. LEVINE: The Government objects on the
16	grounds of relevance to all of them.
17	THE COURT: We will mark them in evidence.
18	MR. DIAMOND: I would prefer to have them all
19	marked as DW-2, your Honor.
20	(Defendant Dwyer's Exhibit 2 received in evi-
21	dence.)
22	Q Will you identify these?
23	A That is all I have ever seen, all those there.
24	THE COURT: The record should reflect that they
25	are swords.

xxx

**B4** 

1	iamjb	Dwyer-direct	398
2	Q	Did ne have that on a manniquin?	
3	Λ	110.	
4	Q	Do you know how many uniforms he had a	ltogether
5	A	Goodness sake, up in the attic there we	as case
6	after case	with uniforms, different components of	uniforms.
7	Q	And this bag is loaded with heads?	
8	A	He used that to display all those helm	ets that
9	he nas.		
0	Q	Did he ever have a genuine human skull?	?
1	A	I believe that he had a Japanese skull	. They
2	were pretty	common. In the service during the war	you
3	could pick	them up on the beaches in the South Paci	ific.
4	Q	He had one in his collection?	
5	A	I had one aboard ship in the Solomons.	
6		That is a replica of a flint lock rifle	around
7	Revolutiona	ry times. He got interested when they h	nad a
8	Fourth of J	uly celebration in Gettysburg, Pennsylva	inia,
9	and he a fr	iend over there and he started to get in	terested
0	in that stu	ff and they parade, like the Blue and the	e Gray,
1	and so on.	And so he got the replica. I think he	nau a
2	couple of t	nose.	
3	and the second s	He also had two huge wagon wheels that	he was
и	going to ma	ke a Civil War cannon of. He was suppos	ed to
5	make a carr	iage, and there is a place out in Michig	an, they

1	mmjb Dwyer-direct 399
2	will cast a brass or iron muzzle loader for you.
3	Q And this?
4	A Some kind of jungle camouflage but there are
5	so many of those that he has got around from various ser-
6	vices. I don't know whose that is.
7	That is more jungle camouflage.
8	Q Is this jungle camouflage?
9	A I can't see for surc.
10	Q If you can't see it, it is camouflage.
11	A That is the intention.
12	Q Is this another uniform he had in the basement?
13	A Yes. That may be British.
14	Q And this one, can you identify that one as being
15	in your basement?
16	A Yes. I believe that is British, but I'm not
17	sure. It could be British or Canadian, and I'm not sure.
18	Q This one?
19	A I believe that is American, at the time of
20	World War I, but I'm not sure about it.
21	Q And this and others?
22	A More jungle camouflage.
23	Q Did Jack over the years as he got older tend
24	to become more and more involved or less and less involved?
25	A No, more and more. He became completely

1	mmjb	Dwyer-direct	401
2		MR. LEVINE: Objection.	
3	Q	Where did you learn about this?	
4	A	I know different people that are interested	ed in
5	this hobby,	people locally from Edison. It is not an	
6	uncommon thi	ng.	
7	. 0	Jack has been charged with some serious co	rimes
8	nere, tradin	g and transferring guns and so forth. Is	
9	Jack in the	business of making money on these things?	
0	Λ	If he is I don't know where.	
1		MR. LEVINE: Objection.	
2		THE COURT: He has answered.	
3	Ö	Aside from Dr. Stewart and the Marine medi	cal
4	psychiatrist	, the Air Force psychiatrist, do you know	
5	whether or n	ot he has gone to any other doctor?	
6	A	Yes.	
7	Q	What other doctor?	
8	A	Presently he is going to Rutgers Psychiatr	ic
9	Clinic.		
0	Q	Where is that?	
1	A	Well, they have a center in Metuchen. Init	ially
2	I believe he	went to the Metuchen Center. Now I don't	:
3	know where he	goes, to New Brunswick or Metuchen, but	ı
4	know he goes	there weekly.	
5	Q I	lave you seen Jack depressed at any time?	

B4

A About nine or ten years ago there was a situation. He reached a stage where it even became apparent to me, and certainly to his mother, and this led to him being taken in hand by Dr. Stewart, because his mother became so alarmed at the state of his depression.

MR. LEVINE: Objection.

out. Just erase that from your minds, ladies and gentlemen. It is stricken.

- Q Were you also alarmed?
- A Very much so.
- Q Just talk about yourself. Why were you alarmed ten years ago?

MR. LEVINE: Objection, your Honor.

MR. DIAMOND: He is testifying to what he saw.

MR. LEVINE: The question asked why.

THE COURT: I am well aware of it. Go ah ad.

See if you can answer it.

A For a period of time he lost all interest in even his hobby, his weight lifting or anything. He just lay on his bed, remarked that he was not this, that, or thus, and I called our friendly doctor, Dr. William Toth, and he, in turn--Jack knew Dr. Toth and he had a great deal of confidence in him; Jack would not confide in me--

		1150	
1	mmjb	Dwyer-direct	404
2		MR. LEVINE: Objection, your Honor.	
3	A	No.	
4		THE COURT: The answer is no. I will let	it
5	stand.		
6		MR. DIAMOND: No further questions.	
7		(Continued on page 405.)	
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Take 4 p.m.1	mdlt 1 Dwyer-cross 405
2	THE COURT: Do you want to cross examine?
3	MR. LEVINE: Yes, your Honor. Does Mr.
4	Boyan want to question him?
5	THE COURT: Mr. Boyan, do you want to
6	question him?
7	MR. BOYAN: No, your Honor.
8	THE COURT: I didn't think so.
9	CROSS EXAMINATION
10	BY MR. LEVINE:
11	Ω Mr. Dwyer, you said your son collected
12	pictures of World War II, war leaders, is that correct,
13	and you brought some of them here in the courtroom?
14	A Yes.
15	Q Is that all he collected, World War II
16	war leaders?
17	A Is that all he collected?
18	Q No. He collects pictures only of World War
19	II war leaders?
20	A He collected pictures of the principals.
21	That would be about four.
22	Q What were the four you recall?
23	A Tojo, Mussolini, Hitler, Stalin. I'm
24	talking about the enemy war leaders.
25	Q Churchill?

1	mdlt 3 Dwyer-direct 407
2	THE COURT: I don't want you to testify.
3	Q Well, this one is here today, isn't it,
4	Mr. Dwyer?
5	A That's not a picture. That's a print.
6	Q And I think you were shown a picture of
7	Mussolini, weren't you, that you identified here today?
8	A I believe so.
9	Who decided what to bring today?
10	A I didn't.
11	Q Or yesterday, Mr. Dwyer?
12	Λ I didn't.
13	THE COURT: Do you know who did?
14	THE WITNESS: My son decided what he was
15	bringing. When I say "decided," he grabbed as much as
16	he could load.
17	O But he has a picture of Churchill and
18	Roosevelt, to your knowledge?
19	A I believe so, but I wouldn't swear to it.
20	Q And they are not here today, is that correct?
21	A I don't know.
22	I said I don't know what's all in those
23	cases. You're opening them now for the first time. I helped
24	load them in my truck, but I didn't help pack them. My son
25	wouldn't let me touch the stuff.

Was he a firearms collector? I don't recall

1	mdlt 5		Dwyer-cross	409
2	it.			
3		Ω	Is your son a gun collector?	
4		Λ	A gun buff, I think the term is.	
5		Ω	How many guns does he have?	
6		Α	I don't have any idea. I think he has a	
7	rifle,	and f	that flintlock thing.	
8		Q	No pistols?	
9		Α	Not that I know of. His collection that	he
10	had he	had	to dispose of through dealers in order to	
11	finance	e his	defense.	
12		Q	In July of 1974, say, for example, Mr.	
13	Dwyer,	how r	many guns did your son have, approximately	?
14		Λ	I have no idea.	
15		Q	Three?	
16		Λ	He would have more than three.	
17		Ŏ	Five?	
18		A	I would say he had more than five.	
19		Q	Fifty?	
20		Α	I couldn't say fifty. No, I couldn't say	y that
21	sir.			
22		Ω	One hundred and fifty?	
23		Λ	No.	
24		()	Did he have pis tols?	
25		Λ	Yes.	

1	ındlt 6	Dwyer-cross 410
2	Ö	Rifles?
3	۸	Yes.
4	Ó	Short barrel rifles?
5	Λ	No.
6	. ~ .0	Light machine guns?
7	Λ	I never saw one. I saw one, yes, twenty
8	years ago.	He was in the Air Force at the time.
9		Incidentally, the federal agent saw it, too.
10	Q	There is no question. I haven't asked you
11	any question	n, Mr. Dwyer.
12		Any submachine guns, have you ever seen down-
13	sters, in	the basement?
14	Λ	No.
15	Q	Did you see this introduced in evidence?
16	A	I saw it theother day.
17	Q	Did you ever see one of these before in the
18	basement?	
19	Α	No.
20	Q	You were here in court while I read these
21	letters to	the jury, weren't you?
22	Λ	Yes.
23	Q	You heard me read this sentence, did you not:
24		"B.S.J. may have a spare 40 for sale, that's
25	the MP 40.	

1	mdlt 7	Dwyer-cross 411
2		"I will check this weekend. The problem with
3	40s is that	like Thompson's they are popular and everyone
4	wants one.	To me they're okay. I have had about eight of
5	them."	
6		You heard that?
7	Α	Yes.
8	Q	But you never saw one in the basement?
9	A	No.
10	Q	In July of 1974 your son had at least more
11	than five gu	ins, is that correct?
12	Λ	What date, sir?
13	Q	Is that what you testified to?
14	Λ	What date, sir?
15	Q	July, 1974.
16	A	He had more than five guns, yes, sir.
17	Q	Ten?
18	Λ	Yes, sir.
19	Q	Fifteen?
20	Α	I would guess that.
21	_Q	Twenty-five?
22	۸	You're getting beyond me now. I didn't count
23	them, but I	am just visualizing them.
24	Q	Was it too many for you to count?
25	۸	I didn't may that. I said I am visualizing.

1	mdlt 8	Dwyer-cross . 412
2	I didn't cou	ant them and I visualized what was mounted on
3	the wall.	
4	Q	Was every one kept on the wall that he had?
5	Λ	Was it?
6	Q.	Yes.
7	۸	Obviously all this stuff couldn't be put on
8	the wall.	
9	Q	Mr. Diamond has asked you to identify these
10	uniforms, is	that correct?
11	Λ	As part of his collection?
12	Q	That's correct.
13	Λ	When I identified each
14	()	Has he asked you to identify this uniform
15	as part of h	is collection?
16	۸	It came from my home, so it must be
17	Ω	Yes or no.
18	Λ	Yes.
19	Ω	And you have identified these books as part of
20	his collect	ion?
21	Λ	It came from my home this morning. It was in
22	those cases.	
23	()	And he has asked you to identify this bugle.
24	A	That was mounted on the wall.
25	Q	He has asked you to identify this hat as part

1	ndlt 9 Dwyer-cross 413
2	of his collection?
3	A I have seen that.
4	Ω And this belt as part of his collection?
5	A This is one of many belts that came from the
6	house this morning. I would say it was part of his
7	collection.
8	Q And this magazine is part of his collection?
9	A I have read many of those. He has countless
10	ones on all different aircraft.
11	Q And this head is part of his collection?
12	A Yes, that was set up in display.
13	Q And of course you have seen his Revolutionary
14	War flintlock replica, is that correct?
15	A That's correct. That was mounted on the wall
16	Q And these shoes?
17	A He had many sets of different kinds. Over a
18	period of time he had different sets of combat boots. The
19	came from my home this morning, so I would say it is part
20	ofhis collection.
21	Q Part of his gun belt collection, is that
22	correct?
23	A That's right.
24	Q Mr. Dwyer, were you asked to bring in
25	yesterday any of the pistols, submachine guns, rifles,

1		1250
1	mdlt 10	Dwyer-cross/redirect 414
2	short barrel	rifles, that were part of his collection?
3	Λ	Mr. Levine, I wasn't asked
4	Q	Were you asked?
5	Α	I was not asked to bring in anything, Mr.
6	Levine. My	son was asked to bring it in.
7		Did you bring it?
8		THE COURT: Wait a second. Let him answer
9	the question	
10		Now, the second question was, did you bring
11	it in.	
12		THE WTINESS: No, sir, I wasn't asked to
13	bring it in.	
14	Q	You weren't asked to bring it in?
15	Λ	That's right.
16	Ω	Did you bring it in?
17	Λ	There are none that I know of.
18		MR. LEVINE: No further questions.
19		THE COURT: All right.
20		Counsel? Do you have any redirect?
21		MR. DIAMOLD: Just one, your Honor.
22	REDIRECT EXAM	IINATION
23	BY MR. DIAMON	ID:
24	O	You mentioned federal agents coming to your
25	house on cros	ss examination. Would you just tell the Court

R

1 Dwyer-redirect mdlt 12 2 and we have been tracing this gun from dealer to dealer all over the country. We want to see the gun and see if it has been legally deactivated." 5 I said, "Well, go and take a look at it. My son is in Alaska." 7 He said, "We know that." 8 He went and examined the gun which had been 9 welded shut and he came back and told me the gun is all 10 right, and said "We have always been one jump behind the 11 moving from dealer to dealer. They file reports when they 12 sell a weapon like that, but by the time it reaches 13 wherever these things are processed, the normal delay might 14 be weeks and months and we have always been one jump 15 behind, now we finally caught up with it." 16 And he came back and told me the gun is 17 properly deactivated by welding and it is perfectly legal. 18 That's the only weapon I have ever seen. 19 THE COURT: It was welded shut? 20 THE WITNESS: Yes, sir. 21 THE COURT: Okay. 22 THE WITNESS: And that was twenty years ago.

MR. DIAMOND: No, sir.

Mr. Diamond. Do you have any more?

THE COURT: That was your one question,

23

		EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED DECEMBER 19, 1975
т1.в1	1	mmjb * * *
A.M.	2	UNITED STATES OF AMERICA
	3	V. 75 CR. 311
ال	4	JOHN J. DWYER and JOHN S. DOBRANSKI
	5	December 19, 1975
	6	10:25 a.m.
	7	
	8	000
	9	
	10	(Jury in box.)
	11	THE COURT: Call your witness.
xxx	12	ROBERT T. LONDON, a witness called
	13	on behalf of the defendant Dwyer, being first duly
	14	sworn, testified as follows:
xxx	15	DIRECT EXAMINATION
	16	BY MR. DIAMOND:
	17	Q Doctor, you have a cold?
	18	A Yes.
	19	Q Just try to keep your voice up so the jury can
	20	hear. The acoustics in this room are bad.
	21	Dr. London, what is your profession?
-	22	A Medical doctor, psychiatrist.
7	23	Q Where do you have your office?
	24	A East 30th Street, 338 East 30th Street.
	25	Q Will you just describe your background? Where

Well, Mr. Dwyer emerges as a quiet, isolated

11

1	mmjb London-direct 437
2	man who lives a very separate life from the rest of the
3	world.
4	Q In what way does he live a private separate
5	life?
6	A Well, he has a very singular involvement in a
7	particular hobby which has become more than a life style
8	than a hobby, which is his collection of military equipment.
9	Q Now, before today you have not seen this equip-
10	ment? Is that right?
11	A Never.
12	Q The fact that he had such equipment, was this
13	related to you by John or his father or both?
14	A I would say by John.
15	Q How long did your interview last?
16	A About an hour and 15 minutes with John and with
17	his father.
18	Ω Did you have any discussions with the father
19	about his relationships with John?
20	A Yes.
21	Q Will you just in your own way describe what
22	that relationship was as was told to you?
23	A Well, Mr. bwyer, Sr. felt that he was too nard
24	onI'm not certain whether it was John or both the child-
25	ren when they were growing up, and that I think he implied

THE COURT: Doctor, all these statements that you have been referring to refer to statements made to you?

(In open Court.)

24

cowards, and I think it was more dangerous to John to be

in a fight and lose because his father would come down

24

much harder on him in terms of losing a fight than demonstrating what he defined as cowardice; in other words, the scene was set that John, who apparently isn't a fighter by nature, who is not interested in any physical violence, according to John, and, apparently, his father, sort of was forced because his father was very punitive in terms of losing.

Is that clear?

Q Yes.

Now, as a result of your conferences with John and his father, as a result of the impressions you gained, did you come to any opinion as to how John became involved in this private world, as you described it?

Well, I suppose that it was kind of John's way of really fulfilling his father's idea of being an appropriate or proper person. This is my speculation, that John's father, Mr. Dwyer, Sr., has a great reverence to World War II and what he did in it and the military role that he was involved in from my interview. I got that information.

And my thinking is that John, Mr. Dwyer, Jr., complied essentially with his father's wishes, but processed those wishes in a different way and became essentially in his own view a good son in that he devoted his entire life

and handling toy guns and a real gun?

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London-direct

Doctor, in viewing these instruments of war, and paraphernalia of war, and assuming that this is only twenty-five percent of his actual collection, assuming that he's been collecting these things virtually all his life, assuming further that he has very little social life, that he is a man 38 years of age, assuming further that aside from some military service, he's always stayed in his family's home, assuming further that he built his own mannequins and put uniforms on them and made them look like soldiers, assuming further that he had actual model heads with helmets on them all bout his trove room, assuming further that he became a machinist not so much for making a living, but for earning money to invest and reinvest in instruments of war, assuming further that he has always been a shy and withdrawn man, never social zing or rarely socializing with people, assuming further that in the history of his family, it's been entirely military, going back to 1812, assuming further that his father expected him to live up to that military tradition, and that being the peaceful and shy person he was, he couldn't do it, assuming further that he, rather than socialize with people, took in stray animals, cats, showed them love and never assaulted anyone, was never in any trouble as a boy up until this very period of time, could you form, or

- 11	[문항: 4.70 전에 15.10 전에
1	dhlt 2 London-direct 444
2	have you formed an opinion, as to whether or not Mr.
3	Dwyer was criminally responsible or had any criminal
4	intent?
5	MR. LEVINE: Objection, your Honor.
6	THE COURT: That part of it, counselor, you're
7	going to have to rephrase. We have all of the assumptions
8	up to this point. Those can stay.
9	Q Did you form any opinion as to whether or not
10	he had a mental defect?
11	Λ Λ mental defect is a word I have a difficult
12	time dealing with. I could say emotional problem.
13	Q Emotional problem?
14	A Yes, emotional problem.
15	Q What form of emotional problem was that?
16	A By a title, a label? Are you looking for
17	O Yes, in any description or way that could be
18	understood by us as laymen.
19	A According to the psychiatric diagnostic
20	manual, I would say a schizoid personality. I think it has
21	to be differentiated from another illness, clearly.
22	O Do you form an opinion as to whether or not,
23	as a result of any permanent disorder or defect
24	MR. LEVINE: Objection, your Honor. There is
25	no basis in the record.

1	dhlt London-direct 445
2	THE COURT: He said he had an emotional
3	problem.
4	MR. LEVINE: That's correct.
5	THE COURT: All right.
6	Q As a result of this emotional problem, could
7	emotional problem also be considered we are dealing
8	with semantic; could be considered a defect?
9	THE COURT: I don't think it is semantics. Go
10	ahead, Doctor.
11	A It can lead a defective appreciation of .
12	things. I don't think we are calling these things defects.
13	O What are they?
14	A What are the emotional problems?
15	Ω No, is it an emotional disorder?
16	A What I'm trying to say is he does have an
17	emotional order. I'm not comfortable with the word
18	"defect."
19	Q Did that emotional disorder, in your opinion,
20	permit him to conform his con act to the requirements of
21	law?
22	MR. LEVINE: Objection, your Honor.
23	THE COURT: Well, it is inartfully phrased.
24	I think the doctor knows do you want me to do it?
25	MR. DIAMORD: Yes, sir.

to.

THE COURT: Sure.

Because of whatever problems you found, do
you have an opinion whether at the time of the incident
alleged in this indictment, which is September 1st to
October 5th of 1974 -- do you know whether the defendant
suffered from a mental disease or a defect? Do you have an
opinion as to that?

THE WITNESS: At that time my opinion is that he had the same problem he has today.

THE COURT: Is that a mental disease or defect?

And the second thing is, whether as a result of whatever problem he has -- this is more important -- the defendant lacks substantial capacity to appreciate the wrongfulness of his conduct, that he lacks substantial capacity to conform his conduct to the requirements of law.

THE WITHESS: I think the last issue I can speak about first.

THE COURT: All right. Do it any way you want

THE WITHESS: He could lack -- in his issue of military equipment, I think he would lack sufficient ability to conform his behavior to the law.

140a 1 dhlt London-direct 447 In other words, I think that he is driven by what I would call technically a repetition, compulsion to 3 deal in military instruments well above and beyond any laws 5 that would bind him. THE COURT: Do you feel that this is a thing 7 for collection or dealing? THE WITNESS: It's collection. I don't 9 understand the nature of collection and dealing. In other 10 words, I don't know very much in this -- in other words--11 THE COURT: The case here involves an allega-12 tion of sale and transfer to others of military equipment. 13 That is what I mean by dealing. 14 THE WITNESS: I have been given the impression 15 that collection involves dealing. In other words, I have 16 been given the impression that in order to collect, you have 17 to obtain it and kind of trade things, and that way --18 that's how he understands collection. 19 In other words, you have to collect it from 20 someone and in turn trade with other people, but I don't 21 know anything about gun collection or gun --22 Doctor, you're not a foreign psychiatrist, 23 are you? 24

You're not accustomed to coming in day after

No.

1	dhlt	London-direct 448
2	day to court	and testifying as a psychiatrist?
3	Λ	Right.
4	0	How many times have you testified in court?
5	Λ	This is the first.
6	Q	The first time. So that you're not accustomed
7	to dealing w	ith lawyers and legal terms; is that right?
8	Λ	Right.
9	0	All you're doing is telling it as you see it?
10	Λ	Yes.
11		THE COURT: There's always got to be a first
12	time you're	called as an expert, Doctor.
13	Q	Doctor, is this a compulsion in the nature of
14	like a klept	omania who feels compelled to do things?
15	Λ	Yes.
16	Q	Compelled to take things even though they
17	don't need i	t?
18	Λ	Yes. That suits yes, that fits.
19	Q	An inner driving, an inner compulsion?
20	Λ	Right.
21	Ō	Would this be true if Mr. Dwyer took guns
22	to sell them	, to take the money, to buy more guns as a
23	collector?	
24	Λ	Yes.
25	Q	Doctor, we lay people know, I think, something

1 dhlt London-direct 449 2 of Walter Mitty and the private world that he had. 3 this something of that nature, a private world that he's 4 created for himself, a secret world? 5 It is his world. It may be private to us, 3. it is not private to him. 7 In other words, there's nothing secretive about 8 what he's done, what he imagines. Once surrounded by all 9 the equipment as private world, if he does imagine certain 10 things. 11 Thank you, Doctor. 12 Doctor, this problem that he has, a defect 13 or disorder or whatever it is, is that a curable disorder? 14 I would say yes. 15 I would say it is treatable. I don't think 16 you can talk clearly in terms of cures. I would say it 17 is treatable with -- in all likelihood improvement, and good 18 improvement. Thank you, Doctor. 20 Doctor, one last thing. Did you have occasion 21 to read Court's Exhibit 1? It is a letter dated December 22 13, 1975, from Dr. Gurston D. Goldin. Do you know Dr. 23 Goldin? 24 No.

He's a psychiatrist --

. 1	dhlt London-direct 450
2	THE COURT: He doesn't know him.
3	Q Did you have occasion to read that letter?
4	A I looked at it just before. I looked through
5	it before.
6	Q Yes. Would you read the third paragraph out
7	loud?
8	MR. LEVINE: Objection, your Honor.
9	THE COURT: Sustained.
10	MR. DIAMOND: That's all.
11	MR. LEVINE: Your Honor, could we approach
12	the side bar?
13	THE COURT: Sure.
14	(At the side bar.)
15	MR. LEVINE: Your Honor, the government
16	has previously handed up to the Court a memorandum of law
17	on the issue of the defendant's burden to raise the issue
18	of insanity. And very simply, your Honor, on the basis of
19	Dr. London's direct testimony, I think the record is
20	perfectly clear that this doctor has not testified that
21	John Dwyer suffered from any mental disease or defect at
22	all, that he has a schizoid personality and has some
23	emotional problems.
24	The government would make an aplication that

his testimony be stricken and that the jury be ordered to

dhlt London-direct _ 451
disregard it, and that they're not entitled to a sanity
defense.
MR. DIAMOND: The doctor used the term
"disorder,"
THE COURT: No. Well, emotional go ahead.
MR. DIAMOND: He used the word "disorder,"
your Honor. I think we are dealing in a field of expertise.
If your Honor is disposed in the direction of the
prosecution's request at this time, I am just assuming you
might be, if you are
MR. LEVINE: I can't hear you.
THE COURT: That's the problem.
MR. DIAMOND: If your Honor is disposed in that
direction, and believes the doctor has not testified in
support of this insanity defense, can you reserve your
decision until such time as the government puts its doctor
on the stand so that we can get into the issue of whether
or not "disorder" means the same thing as "defect"?
Your Honor, the words are bandied about, and
I think the doctor here, when he used the word "kleptomaniae,"
he has put his finger on the problem here, which is an
inner driving force, compulsion, like that of a kleptomaniac
where he can't help himself. And if he can't help himself,

he can't conform to the requirements of the law, as such.

London-direct

MR. LEVINE: Your Honor, it is not semantics with the word "mental disease," or "defect."

The Freeman case is very clear.

MR. DIAMOND: But, your Honor, may I point out that a kleptomania -- I know there are psychiatrists who will testify that a kleptomaniac has a mental defect. It is not anything where he's a raving maniac or can't control himself in other areas, because obviously he can. But it is just on this one mono-mania, this thing that has become his whole life.

I would beg your Honor to consider not only the testimony of the doctor, but also the lay testimony here, which seems to all point in that direction, that this man can't help himself.

MR. LEVINE: Your Honor, just one further comment:

I'm n entirely clear on the law, but the government would be entirely clear on the law, but the government would be entirely clear on the law, but the government would be entirely clear on the law, but the defendant produced to bring in the testimony of a psychiatrist in defense of the insanity defense, if the defendant produced sufficient to raise the issue.

THE COURT: Oh, I'm quite sure that Mr.

Diamond will stipulate you can put in anything along those
lines.

MR. DIAMOND: Of course.

1	dhlt London-direct 453
2	THE COURT: All right.
3	MR. LEVEIN: It is not here in the record,
4	your Honor, he hasn't raised it.
5	THE COURT: Well, the problem is we have a
6	doctor who is perhaps unused to the technical legal terms.
7	I'm going to let the jury take a break right
9	now. With us hanging around in this corner of the bench
9	they can become annoyed.
10	(In open court.)
11	THE COURT: Ladies and gentlemen, the last
12	thing you would want to do is to sit and just watch us
13	discuss matters of law at the side of the bench. This is
14	going to take a couple of minutes, to resolve the
15	question that came up.
16	Under the circumstances, I think that you
17	can retire to the jury room and relax a little bit. All
18	right?
19	(Jury excused.)
20	THE COURT: Perhaps as a matter of pure
21	technicality, Mr. Levine might be right.
22	Have you ever discussed this matter with
23	Dr. London?
24	MR. LEVINE: We don't even have a report by
25	Dr. London.

1	dhlt London-direct 454
2	THE COURT: Doctor, did you make a report out
3	THE WITNESS: No.
4	THE COURT: Under the circumstances, before
5	any cross examination, Mr. Levine, I think you ought to tal
6	to him for a couple of minutes.
7	MR. DIAMOND: All right.
8	THE COURT: We will take a break and let you
9	have an opportunity to talk to him.
10	MR. LEVINE: Thank you.
11	(Recess.)
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T3.Bl	1	mmjb 1 London-direct 455
	2	(In the absence of the jury.)
	3	THE COURT: Juror No. 5 was in quite a bit
_	4	of discomfort and she is now down in the health room with
	5	the nurse. As a practical matter I am excusing her. I
	6	will inform her later. That is Mrs. Leah Joachim. She is
	7	a nurse. Nurses get sick, too.
	8	Please bring the jurors back.
	9	(Jury in box.)
	10	THE COURT: Rather than play musical chairs,
	11	stay exactly where you are.
	12	I have released Mrs. Joachim. She is presently
	13	down in the health unit. She will be all right.
	14	Mr. Levine, do you wish to cross examine?
	15	MR. LEVINE: No questions, your Honor.
	16	MR. DIAMOND: Just a few more questions.
	17	MR. LEVINE: Objection, your Honor.
	18	THE COURT: Let him ask one more question.
	19	It is unusual.
	20	BY MR. DIAMOND:
	21	Q Did Mr. Dwyer express anything about political
	22	opinions when he talked to you?
	23	A I asked him his politics. In our interview I
	24	asked him what his feelings were politically and he said
	25	MR. LEVINE: Objection.

The next thing, you saw the defendant on the

We all do.

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1	mmjb 3 London-direct 457
2	15th of December, 1975?
3	A Yes.
4	Q That is the only time you saw him?
5	A Yes, and today.
6	Q On the 15th of December, 1975, the defendant
7	said he had no interest in politics and never voted?
8	A Yes.
.9	Q Do you know what the defendant's IQ is?
10	A I don't remember the figure, but it was well
11	into the bright, normal range. I think it was very high
12	or high.
13	Q It is over 130? Is that the record that you
14	have?
15	A I don't remember the number, but it could be
16	12 , it could well be that number. I saw it and it was
17	high.
18	Q That is pretty high, isn't it?
19	A Yes.
20	Q And that IQ basically stands for Intelligence
21	Quotient?
22	A Yes.
23	Q Tell me, in an hour and 15 minutes, that is not
24	your normal time to do a complete /chiatric diagnostic
25	workup, is it?

1	mmjb London-direct 458
2	A I can do it. I can do a diagnostic workup in
3	an nour, an nour and 15 minutes.
4	Q Providing you believe the person, the patient
5	is telling you the truth? Right?
6	A Yes.
7	Q Mr. Dwyer said to you he had no interest in
8	politics and never voted?
9	A I asked him a question. I kind of primed him
10	for the question, because I was curious to see if I could
11	tie the gun collection or the whole military collection
12	into a kind of meaningful picture.
13	() What did he say? That is the reason you asked
14	the question. Generally you don't care about anybody's
15	politics?
16	A It does not interest me, but I was trying to
17	see it in an overall picture of developmental history and
18	I asked him what his political affiliations were. he said
19	none, and he said, as a matter of fact, "I have never voted.
20	And I said, "Do you care who is President or who is what?"
21	He was just totally disinterested; he has no interest what-
22	soever.
23	Q That is what he told you?
24	A Yes

\* \* \*

THE COURT: Step down; thank you very much.

1 . dhlt 7 M. Dwyer-direct MR. DIAMOND: Is the objection sustained, 2 your honor? 3 THE COURT: Yes. MR. DIAMOND: That's all. 5 6 THE COURT: Any questions? 7 MR. LEVINE: No questions, your Honor. THE COURT: Step down, Mrs. Dwyer. 9 (Witness excused.) 10 MR. DIAMOND: Sir, your Honor, I have been trying to reach Dr. O'Connell. I have talked to his wife 11 12 on the telephone. She doesn't know -- I talked to Dr. O'Connell\_last Wednesday, I believe. He said he was --14 MR. LEVINE: Your Honor, could we take this 15 at the side bar? 16 THE COURT: Sure. 17 (At the side bar.) 18 MR. DIAMOND: I talked to Dr. O'Connell 19

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last Wednesday. He told me that he is now testifying in various court proceedings in the Middlesex County Court, and that I should attempt to reach him today to see if he was free.

I called today. I spoke with his wife at noon. She is a psychologist herself. She told me that she didn't know where he was, he could be in court, she

THE COURT: If he's a witness, he is available

MR. DIAMOND: Yes, sir. But in twenty-one

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through subpoena.

years I have practiced I have never subpoenaed my own experts, your Honor.

THE COURT: What was the first time you contacted him about showing up today? We have been on trial now, remember, five days.

MR. DIAMOND: The first time I contacted him,
your Honor, was when the first day of the trial started,
I told him the government would probably finish its case
in one day and he should come in on Tuesday. That was back,
I believe --

THE COURT: I can't blame the government for not finishing in one day. Go ahead.

MR. DIAMOND: Yes. When I spoke to him last
Wednesday, he told me that because we didn't proceed he
had committed himself to testify in other matters, including
specific commitments, and many, many things like that, and
that I would have to call him day by day to see if he is
available. That's what developed, because the matter was
put off from the 8th.

THE COURT: At the same time, Mr. Diamond,
you are aware, it has been made known to you at least three
times at this point, that the psychiatrist that the
government has called was due here at 2 o'clock and will
not be available hereafter; is that correct?

1 dhlt 2 MR. DIAMOND: Yes, sir. In that event, your Honor, I would agree to have Dr. Portnou testify 3 subject to my just putting one more witness on the stand, 5 who would be Dr. O'Connell. 6 THE COURT: How can Dr. Portnou give his 7 rebuttal if you don't have a doctor, psychiatrist, here 8 who is willing to testify, and Dr. London I don't think did, 9 that this man is suffering from a mental disease or defect? 10 MR. DIAMOND: Your Honor, I have some law 11 which talks about mental disorder and I think it is 12 really a question of semantics. 13 THE COURT: It is hardly a question of 14 semantics. 15 MR. DIAMOND: Sir, I can show you definitions 16 where the government in the Durham case used mental disorder 17 instead of defect, and these words are interchangeably 18 used. There is no precision, no omnissions --19 THE COURT: I'm not asking for omnissions or 20 precisi .. I am just asking for an opinion, and the 21 opinion was that he didn't. Where do we go from here? 22 You are looking for a continuance which is basically to

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MP. DIAMOND: No, sir. What I'm asking --

foreclose the government from callings it psychiatrist

and also to put the matter off until Christmas week.

THE COURT: I will consider it. You better get on the phone and see if this guy will be here in a half an hour.

MR. DIAMOND: Your Honor --

THE COURT: I am going to let the jury go.

Listen, you're getting more of a break than
you deserve.

MR. DIAMOUD: Your Monor, you have been very patient with me and very considerate.

THE COURT: I'm not suggesting you are doing anything wrong. I recognize that you have difficulties from time to time. This is not one that anyone is looking for. Everybody stay right here.

(In open court.)

THE COURT: Ladies and gentlemen, we have one of those other times where we are having a conference about questions of law, and while I'm sure that you would enjoy looking at the faces of all of us, you must, I'm sure, get bored looking at the south end thereof.

Under the circumstances, the clerk is going to escort you out to the jury room where you can relax for couple of minutes.

All right?

(Jury excused.)

dhit THE COURT: Counselor, you get on the phone. MR. DIAMOND: I will, sir. THE COURT: Meanwhile, I will take the other cases right now. (Recess.) 

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(In the absence of the jury.)

THE COURT: Mr. Diamond?

MR. DIAMOND: Your Honor, I called Dr. O'Connell at his office. I asked nim if it was possible for him to come in today, and he said he could be here at 10:00 Monday morning if I personally picked him up, and I said I would if the Court would allow him to testify on Monday.

He is my last witness, your Honor.

THE COURT: You have no other witnesses?

MR. DIAMOND: No, sir.

THE COURT: Mr. Levine, you have a psychiatrist present?

MR. LEVINE: That is correct, your Honor.

morning. My immediate reaction is that he should not be permitted to testify, but I will think about it over the weekend and I may change my mind.

Do you have any witnesses?

MR. BOYAN: I wanted to put on Mr. Dwyer, Sr. very briefly.

THE COURT: What do you mean by very briefly?

MR. BOYAN: think five minutes.

THE COURT: Yes.

HR. BOYAH: Your Honor, I would have no objection

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to any other schedule that may be convenient for the Court or the other parties.

THE COURT: How about your doctor?

MR. LEVINE: He is in the back of the Court.

THE COURT: Let us put him on first.

MR. LEVINE: Your Honor, before the Government puts Dr. Portnow on we renew our application to have the testimony of Dr. London stricken and I would hand up to your Honor United States of America versus Currier, a case where the trial judge refused to instruct the Court on the insanity defense when there was no evidence of a mental disease or defect.

And I also hand up to your Monor United States of America against Freeman, which explicitly adopts the caveat to the ALI insanity defense definition which states in part that the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct, and there be no reason for the Government to put Dr. Portnow on Decause there has been no evidence in the record of any mental disease or defect.

THE COURT: Put him on anyway.

(Jury in box.)

THE COURT: Ladies and gentlemen, Mr. Diamond

1 munju 496 on behalf of Mr. Dwyer has rested subject to certain rulings 2 which I have yet to make. The Government has a psychiatrist! 3 4 by the name of Dr. Portnow present, and since this man's work does not involve only this case, but others, I have 5 6 requested the parties to agree to let the Government put 7 him on now so that we can hear nim and he can continue 8 about his work. Mr. Levine, will you call him. 10 MR. LEVINE: The Government calls Dr. Stanley 11 Portnow. STANLEY PORTNOW, a witness called on 13 benalf of the Government, being first duly sworn, 14 testified as follows: 15 DIRECT EXAMINATION 16 BY MR. LEVINE: 17 Dr. Portnow, what is your occupation? 18 I am a psychiatrist. 19 Will you tell the jury your educational back-20 ground, please? 21 A received a Doctor of Medicine degree in 1957 22 from the University of Zurich. I did a rotating intern-23 ship at St. Elizabeth's Hospital in Washington, D.C., 24 followed by a residency in psychiatry at the Menninger 25 Foundation in Topeka, Kansas, followed by another year's

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mmjb 1 Portnow-direct 437 residency in psychiatry at the Roosevelt Hospital in New 2 3 York City. I have done post-graduate work and am a graduate of New York Medical College comprehensive course in psycho-5 6 analysis. That is basically my education. 7 I have attended courses and have taught courses in mental disease disorders, legal insanity at the University 9 of Southern California. 10 Will you please tell the jury some of your pro-11 fessional achievements and qualifications? 12 A I am a diplomate and examiner of the American 13 Board of Psychiatry and Neurology; I am an associate professor, clinical professor of psychiatry at N.Y. University. I 14 15 amimmediate past chairman of the Committee on Law and 16 Psychiatry of the American Psychiatric Association; I am 17 a consult int to the Committee on Psychiatry in the criminal 18 law of the American Bar Association; I am one of the founders of the American Academy of Psychiatry and Law; I am the former chief of forensic psychiatry at Bellevue hospital; 21 I am service consultant to the United States Southern and 22 Eastern Districts and to the Military. 23 MR. LEVINE: At this time the Government would

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MR. DIAMOND: No objection.

like to have Dr. Portnow qualified as an expert.

1	mmjb	Portnow-direct 498
2		THE COURT: No objection. He is qualified.
3	Q	Dr. Portnow, have you testified previously in
4	Court as a	qualified expert for defense of criminal respon-
5	sibility?	
6	A	Yes, sir.
7	Q	Now many times approximately?
8	Λ	I would say upwards of 50.
9	Q	How many times of those for defendant ?
10	λ	More often for the defense than for the prosecu-
11	tion. But	I don't have a record. I'm sorry.
12	Q	Did you have occasion to examine the defendant,
13	John J. Dwy	er?
14	A	I did.
15	Q	And when was that?
16	А	December 12, 1975.
17 -	Q	As a result of your examination were you able
18	to form an	opinion as to whether the defendant John Dwyer
19	suffered fr	om a mental disease or defect in September and
20	October of	1974?
21	Λ	I was able to reach such a conclusion.
22	Q	And what was that conclusion?
23	A	It was my conclusion that he by no stretch of
24	the imagina	tion had a mental disease or defect at all in
25	September o	r October of 1974.

Q Will you please first explain to the jury what a mental disease or defect is?

A If I may do it in reverse order, mental defect is usually--

THE COURT: Don't tell me; tell the jurors.

who are of inadequate intelligence, people who have IQ's usually hitting in the 60 range; some people start in the 70 range. But we begin to talk of mental defect when we start talking about moderate degrees of mental retardation. Mental disease is a term which is utilized to include in most cases clinical conditions which detach the person from reality, by that I mean what we call a psychotic condition.

when we have a psychotic condition, a condition in which a person is unable to function in reality, not able to go to work, not able to attend to his daily needs, does not pay taxes, does not engage in the ordinary business of living, then we say he is detached from reality and that he is, in fact, suffering from one of the forms of a psychosis. And there are several forms, and he then has what we call a mental disease.

There are symptomatic forms of emotional problems which are not really mental diseases in the terms in

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which I have described it, but, nonetheless, fall under the category of what we refer to as neurotic disturbances, and they are basically symptomatic disturbances, there are hysterical symptoms, phobic symptoms, but these people are still, nonetheless, even with their hysteria or with their phobia, they are able to go to work and they are able to have a family and they are able to attend more or less to the general business of living, whereas the psychotic people are not.

to, is used to refer to those people who are overtly psychotic, that is, detached from reality. It is in some texts sometimes used to refer to the symptomatic types of disorders, the neurotic disorders; it is never used to describe personality problems. Those are disorders which are neither emotional, symptomatic, or mental in origin; they are adjustment patterns of life.

- Would you then please compare an emotional disorder with mental disease? Are they the same?
  - A They could be.
- Q Would you please describe the circumstances under which they could be?

A An emotional disorder is the same as a mental disorder as far as I am concerned. Emotional and mental

nunjb

Portnew-direct

disorders are opposed to behavioral disorders or personality disorders, and one is symptomatically produced, that is, a depression, let's say. And the other one is behaviorally produced, for example, an anti-social act.

And therein lies the difference. A personality problem is a behavioral problem, whereas an emotional or a mental problem or a mental disease is a problem which is either symptomatic or detached from reality and psychotic.

- Q You indicated that you concluded that the defendant John Dwyer was not suffering from a mental disease or defect in September and October of 1974?
  - A That is correct.
- Will you please explain to the jury now what the basic was of your conclusion?

The basis of my conclusion was a review of some records which had been passed to me, primarily, my clinical examination of Mr. Dwyer in my office, and a very short conversation which I had with his father. Basically, that is the basis for my decision.

Q Will you please explain to the jury some of the facts that underlie your conclusion?

A Well, as I understand the alleged crime in this case--we are talking basically about a behavioral pattern, a pattern which has apparently existed for a long period of

time, if not over an entire lifetime—and the man, Mr.

Dwyer, the defendant, rather, is not suffering from a psychosis, he is not detached from reality, he goes to work, he comes home, he gives money to his parents for room and board, he has a social life, he has a car, he even pays taxes, he engages in the ordinary business of living.

he is not substantially, if at all, detached from reality.

nave either one of the neurotic disturbances; he does not have any symptomatic type of disturbance which is so pronounced.

the was very concerned and anxious about the case about which we are here, which I think is perfectly natural and normal. But he had no particular symptoms to complain of either of a phobic or of an hysterical or a depressive or of a paranoid nature.

neurotic problem.

pattern of collecting military objects and clothing and guns, in particular, which is in the form, as he describes it, of a hobby, a hobbist. It is perhaps in my mind, at any rate, equivalent to coin collectors, except collecting coins is not particularly dangerous or against the law, or

stamp collecting, which is also not dangerous or against the law.

But his particular type of hobby, which consumes him in terms that he spends a lot of money with it and his entire existence, in fact, seems to revolve around the compilation and collection of these items, but even when he does that, even when he does that he is not detached from reality. He knows that a gun is a gun and he knows what it is that he is collecting or trading or selling, or something to that effect.

I mean, a gun never is a banana; he never loses its connection with reality. And, therefore, I cannot say that he has a mental disease.

(Continued on page 504.)

		1008
Take A	4 p.m.1	mdlt 1 Portnow-direct 504
	2	Q Did he indicate to you how many guns he has
	3	owned?
	4	A Oh, he told me
	5	Q Over the years?
	6	Λ I'm sorry.
	7	Q Over the years.
	8	A He told me that at one time he had and I
	9	have to refer to my notes between 300 to 500 guns, but
	10	that the most that he ever had at one time was about 230.
	. 11	Q Dr. Portnow, you have just described you
	12	have just explained your opinion that the defendant John
	13	Dwyer does not suffer from a mental disease or defect.
	14	But assume for the moment that he does suffer.
	15	or that he did suffer from a mental disease or defect in
	16	September and October of 1974. Would the mental disease
	17	or defect that he would have suffered in September
	18	and October of 1974 have caused him to lack substantial
	19	capacity to understand and appreciate the wrongfulness
	20	of his acts?
	21	MR. DIAMOND: I object, your Honor.
	22	
7-	23	kind of mental disease or defect, fine, but it is a little
	24	
	25	Q Dr. Portnow, in September and Octob er of 1974,

mdlt 2

Portnow-direct

did the defendant John Dwyer lack substantial capacity to understand the wrongfulness of his acts?

He exercised -- he did not lack any substantial capacity. He knew -- anything that I have learned about what has occurred indicates very great capacity to know and appreciate w hat was going on, so that I cannot say -- I don't know -- I don't know what kind of mental disease or disorder you want to assume, but let us assume a psychotic disorder, out of contact with reality, without giving it a more specific name.

The facts as I know them would indicate to me that he was not lacking in substantial capacity. As a matter of fact, I don't see where he was lacking in any capacity to understand what was going on or what he was about.

Q And what are the facts underlying that conclusion?

## A Well --

MR. DIAMON: Your Honor, I don't want to interrupt the doctor, but I don't understand now, is this on the assumption that he was at that time suffering from a mental disease, and if so, what disease?

out that you can have, and that is, completely out of touch

170a Portnow-direct mdlt 3 1 with reality. 2 THE WITNESS: A psychotic disorder. 3 MR. DIAMOND: Would that be in the area of schizophrenia? 5 THE COURT: Psychotic disorder is what he 6 said. I can't define it. 7 O Did he lack any capacity to understand what 8 9 he was doing? No. I don't believe so. 10 What are the facts underlying that conclusion? 11 Well, he gave me what I thought was a very 12 coherent and logical story as to what happened, and I 13 questioned him as to his motivation as to what happened, 14 and he gave me very substantial responses as to his 15 reasoning about for, just to give one example, I asked him 16 if he had known that the people in the Smith apartment were 17 in fact agents, and not bona fide people to whom he thought 18

response was no, he wouldn't have.

If I can quote from my report:

he was selling his guns, would he have sold them; and his

"What would you have done if you had known that Smith was an informer and that Smith and the agent were lying?"

"I would have said that the guns are not for

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## Portnow-direct

sale and made some excuse to get out of it."

He had very substantial capacity to know and appreciate that one did not sell guns, let's say, to informers or to government agents, in this particular case.

There are other things to infer from what he says. He knew for example, that to sell guns one needed a license or a permit, I think a federal dealer's permit, and that in fact at one time he had a federal dealer's permit, knowing that such a permit existed and knowing that he had to have one if he was to engage in this type of activity, and yet he gave it up and didn't have a federal dealer's permit in September and October 1974, and he apparently was aware of the fact that that was wrong and that he could have conformed, for example, his behavior at that point had he chosen to get a federal dealer's permit if he were eligible to do so.

Also, he didn't -- I would also gauge substantial capacity by thinking that, you know, he wasn't giving the guns away to another collector, like a swap, I'll give you something and you give me something. He sold them for money. He sold them -- I don't know whether it was for a reasonable amount of money or not, since I am not knowledgeable about those things, but he knew that they were worth money, and he asked for money, and that shows some capacity,

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if not certainly substantial capacity, to know that he could ask and receive money for those guns.

so I think that if one goes through the events as described, one has a very difficult time finding where he didn't have capacity. That would be much more of a problem.

Por example, why were the guns left in Dobranski's car downstairs? Why, if he knew it wasn't against the law, for example, didn't he just bring the guns upstairs and parade +hem off in the apartment?

them to the right people. Now, he didn't know that the right -- he wanted to be sure, he told me, that they were not going to get into criminal or into radical hands. That was his concern at that point.

Q Dr. Portnow, have you reached a conclusion as to whether or not the defendant lacked any capacity to conform his conduct to the requirements of the law? I think you have answered that question in part, but could you just answer it again?

- Yes, I have reached such a conclusion.
- What is the conclusion?
- A I think that was able to conform his behavior to the requirements of law, and I asked him very specifically

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## Portnow-direct

in my office if I had a gun on my table would he become mesmerized, would he become hypnotized by it and have to -- have to stop everything and go into some type of revery about the gun, and he said, no, that he would be very curious about the gun, since he is an avid gun collector, and that he would want to know what kind of firing mechanism it had, and things like that, but that he would not necessarily have to get up from the chair and go over and pick the gun up and look at it, and that he does not march around to martial mus a when he has guns, or he doesn't indiscriminately shoot them into the air.

He doesn't do any of the types of things which otherwise might lead to such a conclusion, namely, that he couldn't substantially conform, so I conclude he can conform his behavior to the requirements of law.

MR. LEVINE: No further questions at this time.

THE COURT: Mr. Diamond, you may inquire.

MR. DIAMOND: May I see the report, please?

THE WITNESS: I mailed you a copy. Did you

not receive it?

MR. DIAMOND: I did not.

THE COURT: Here's a copy.

(Document handed to counsel)

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1	dhlt Portnow-cross 510
2	CROSS EXAMINATION
3	BY MR. DIAMOND:
4	Q Dr. Portnow, how long did your entire
5	examination take?
6	A I would say an hour and a half. I had set
7	aside two hours and a part of it was spent with Mr. Dwyer
8	Q How much time was spent with the defendant,
9	and how much was with his father?
10	A A very short period of time with the father.
11	Most of it with the defendant. I would say an hour and a
12	half.
13	Q In your report, Doctor, you state that you
14	took into account the psychological report of Dr. O'Conne
15	the psychiatric report of Dr. O'Connell on 9/11 and
16	9/15/75, is that right?
17	A Yes.
18	Q During that period of time that you were
19	examining the patient, did you read that report or did you
20	read that report prior to examining the patient?
21	A No, I had a copy of the report prior to his
22	coming.
23	Q After reading that report, did you call
24	Dr. O'Connell or consult with him and ask him about the
25	meaning of anything he said?

1	dhlt	Portnow-cross	511
2	A	No.	
3	Q	In reading the report, Doctor, of	Dr. O'Conne
4	do you ha	we a copy of the report, Doctor?	
5	A	I do.	
6	Q	Would you turn to page 5, please.	
7		It says at the bottom of the first	para-
8	graph:		
9		"It is to be noted that he was str	icken with
0 -	p <b>neum</b> onia ter	times, which alone would produce	some brain
1	damage."		
2		Did you consider that factor in ma	king your
3	examination?		
4	A	As a matter of fact, Mr. Diamond,	I underlined
5	that, and I w	anted to know whether he ran any t	ests to
6	determine any	brain damage, and I re-read the r	eport as
7	a result of t	hat one particular statement. The	re is
8	nothing in he	re to indicate any brain damage at	all .
9	Q	Did you think that important enoug	h to call
0	D: O'Connell	and ask him if he had run any tes	ts?
1	Λ	I am normally I normally do not	contact
2	people who ar	e going to be witnesses in a trial	in which I
3	may be testif	ying, and I was informed that Dr.	O'Connell
4	was going to	be a witness.	
5	Q	Could pneumonia suffered at least	ten cimes,

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could that produce some kind of neurological or brain damage?

MR. LEVINE: Objection, your Honor.

THE COURT: I will let him answer it.

A Brain damage from pneumonia is not common.

I have never heard of it occurring. However, in all fairness, pneumonia can produce a very high temperature and people with high temperatures can have seizures, and people who have seizures can have some type of brain damage, but I have never seen it happen, and I have apent a considerable time in neurology.

Assuming that is mother testified that he did have pneumonia and he did have very high temperatures, could that have produced any kind of brain damage or neurological damage?

A If we had an electroencephlogram or some other neurological tests, I could better tell you, but just given those facts by themselves, I am really at a loss to answer your question.

Q Doctor, isn't it true that in arriving at a substantial psychiatric evaluation, it is good medical practice also to conduct a medical examination to determine if there has been any organic damage that might contribute to the psychological problem?

mdlt

Portnow-cross

A If there is an indication that there is organic damage, yes. There was not such in this case.

Q What tests, or what did you do to determine that there was no organic damage?

Well, on his basic clinical examination, he was able to abstract proverbs, he was able to give similarities and dissimilarities, he was able to think in a very abstract way. He showed none of the signs which might point to organic involvement. Had I picked up the slightest indication or organic involvement I would have requested the United States Attorney's office to have a neurological examination, but I must say, that having read Dr. O Connell's report prior to seeing Mr. O'Dwyer -- I'm sorry, it's Mr. Dwyer -- and apparently hear psychological tests were given, and there is no indication in the psychological tests that they came up with organistisy, either, so I did not feel it necessary indicated to recommend a psychological examination.

Q Did you have submitted to you by the United States Attorney's office, a copy of his clinical record in the armed service?

A Yes.

Q Did you read that as well?

A Yes.

Q Doctor, I turn to, I believe it would be, the second page of the report. Did you determine from that report the reason -- strike that.

Did you know who made this report in the service?

- A Well, I only know what's written here.
- Q Was it in the nature of a psychiatric report?
  - A This is a pe-discharge physical.
  - Q Yes.

A This date of examination is January 4, 1960, and I think that's like two or three days before he was discharged from the service. This is the physical which is given prior to discharge.

Q Do you know why -- is this an ordinary done in the service?

A Yes.

So if it states here that "Examinee had severe night sweats. Evidence of tuberculosis has not been demonstrated. These probably represented tax functional hyperhidrosis and down at the bottom he sleeps restlessly and he's lying awake."

A I'm sorry, what page are you reading from?

I'm still on page 2.

1	mdlt Portnow-cross 515
2	Q Page 3.
3	A Could you start it over again?
4	Q "Examinee has severe night sweats. Evidence of
5	tuberculosis has no been demonstrated. These probably
6	represented tax functional hyperhidrosis."
7	Then down at the
8	MR.LITTLEFIELD: We might read the second
9	sentence which says "to recurrence since 1958."
10	MR. DIAMOND: Isn't this for redirect
11	examination?
12	THE COURT: No, you ought to read it in context.
13	MR. DIAMOND: I cannot conduct my examination
14	then as I see fit.
15	THE COURT: Sure, if you read completely.
16	MR. DIAMOND: Then I will read the entire
17	report.
18	THE COURT: Do you want to offer it?
19	MR. DIAMOND: I offer it.
20	MR. LUTTLEFIELD: We have no objection to
21	either the one by Dr. O'Connell or the Army one.
22	THE COURT: I didn't see the Army one. Do you
23	object to the report by Dr. O'Connell?
24	MR. LITTLEFIELD: No.
25	THE COURT: Mark it then. That is the one

1	mdlt Portnow-cross 516				
2	you're reading from, isn't it?				
3	THE WITNESS: No, he was reading from the Army.				
4	one.				
5	MR. LITTLEFIELD: We have no objection to that,				
6	either.				
7	The Court: Do you want the Army one in, too?				
8	MR. DIZITAD: Yes, sir.				
9	THE COURT: Do you object?				
10	MR. LITTLEFIELD: No, your Honor.				
11	THE COURT: Mark it as an exhibit.				
12	(Defendant Dwyer's Exhibits 1) and 14				
13	were received in evidence.)				
14	MR. DIAMOND: Since it is in evidence I won't				
15	read it entirely. I will read certain portions and ask				
16	the doctor about them.				
17	Q Do you see on the first page, "anxiety reaction				
18	chronic moderity, not incapacitating. EPTS."				
19	What does "EPTS" mean?				
20	A I haven't the slightest idea.				
21	Q Did you attempt to find out what EPTS meant?				
22	A No, I did not.				
23	Q Do you know what he meant by anxiety reaction?				
24	A Yes.				
25	Q. What is that?				

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What is your definition of "mental," what does

THE COURT: Mental?

MR. DIAMOND: Yes.

What does mental illness mean?

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Well, illness refers to more of the social implications of the disease. Some people can be mentally diseased and st.ll more or less get along -- that is, have substantial capacity, for example.

But when we talk about mental liness, when someone is mentally ill, then it is beginning to impinge, let's say, on his -- people are beginning to take notice, and it may begin to effect his function.

Dr. Portnow, you are familiar, obviously, with the term kleptomania?

Yes.

Is that a disease or a defect, or what is that?

Kleptomania, of course, is derived from what I think -- kleptomania is really derived from this irresistable impulse. You really can't conform your behavior to the requirements of law. There are cases, for example, of people who go into stores and even though they have a pocke' full of money, the last case I heard of there was a man who went to a ladies' garment section and couldn't help! in full view of the policeman at his elbow, so to speak, or the store detective at his elbow, couldn't nelp but take the thing off the counter.

Kleptomania is this business of having a mania, an absolute inability to control or conform one's benavior

1	mdl t	Portnocross	520
2	in terms of	stealing a particular item.	
3	Q	In other words, he couldn't conform	his
4	behavior to	the requirements of the law?	
5	A	In terms of kleptomania, yes.	
6	Q	In terms of stealing?	
7	A	Yes.	
8	Q	Taking things?	
9	A	Yes.	
10	Q	Is that kleptomania then a disease o	r a defect
11	A	It certainly is no defect, as long a	s the man
12	has an adequ	ate IQ.	
13		It is a disease it depends upon h	ow well
4	the man is i	n contact with reality.	
5	Q	Well, Doctor	
6	A	For example, I know of a case where	an indivi-
7	dual was abl	e to go to work and go home and do e	verything
8	else that a	normal citizen does, but when it came	e to a
9	particular t	ype of situation in his life, he seen	med to los
0	control of w	hat he did. Because he was able to	function
1	he was said	not to have had mental disease in ter	rms of the
2	insanity def	ense.	
3	Q	This man, did an IQ	
4	Α	de was not defective.	
5	Q	le had a reasonably good 1Q?	

Assume that same person, that kleptomaniac, if

he is one instance steals, even though there is a police officer standing right there and takes it right in front of him, and you take the other person who has the same inner compulsion, force, to take it, but looks around to see if there is anybody watching him, are you saying the second person is not a kleptomaniac?

A I am saying the second person does not have a mental disease in the sense of the psychotic disorder required by an insanity plea.

Q I am trying to get you away from the legal definition. I am just speaking medically now.

Is that a sick person, a person, even though he may be wealthy and certainly you have heard of those -- a wealthy person, doesn't need a small article, a high IQ, comes from a fine family background, still takes it but could afford to pay for it, but just takes it because there is an inner force making him take it, are you saying that that person is not a kleptomaniac?

A If he does it with such force that he would do it even if there were a policeman at his elbow he is suffering from kleptomania

Q What about the second person I just gave?

A No, because that one you just gave as exercising judgment.

So he is not a kleptomaniac?

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## Portnow-cross

Presumably he will not take it if he sees the policeman. There are people, however, if there was a policeman really at their elbow that couldn't help but take the object. That is kleptomania.

Q Doctor, did you take into account when you examined Mr. Dwyer that he devoted most of nis life to the collection of this war paraphernalia?

A Yes.

Q Did you further take into account that he was unmarried at the age of 38, and that occupation was a machinist, which was devoted to gaining knowledge to promote his interest in war paraphernalia? Did you take that into account?

A I was aware of all of those facts, yes.

O Did you take into account that his family history is one of military service going back to the War of 1912, that one of his ancestors was in the War of 1812, that he had an uncle who was a colonel in the service in the Asiatic theatre during the Second World War, that his brother is a captain in the Marines and a pilot, that his cousin was in a helicopter and evacuated during the Viet Nam War, that his father was a veteran of the Second World War, that his father was a strict disciplinarian who punished him when he thought the boy lacked courage?

Did you take all those factors into consideration?

A Of the factors which you enumerate, the one which I was aware of were the following, that his brother was a captain in the Marine Corps, he himself had served in the United States Air Force, that his father was a strict disciplinarian. Those were the facts of the numerous ones which you mentioned of which I was aware.

Q Were you aware of the fact at the time you made your report that when he was a boy about ten years old his father gave him a very severe beating because Jack was in a fight with another boy and Jack refused to fight back?

A I am not aware of such detail, other than the fact that he does consider his father to have been a very

	12.0
1	mmjb 3 Portnow-cross 527
2	on September 1st and October 5, 1974?
3	O Yes.
4	A Even if I knew it I would not have taken it into
5	consideration.
6	O Well, then, Doctor, do you take into considera-
7	tion in making your psychiatric evaluations anything that
8	happens during the childhood of a defendant?
9	\ Certainly. I attempt to understand the adult
0	in terms of what has happened to him.
1	O During his childhood?
2	A During his childhood, but engaging his respon-
3	sibility for his adult actions 20 years later one does not
4	look back at parents and sav, "Because vou beat me I am
5	going to rob," or do anything anti-social.
6	O Wouldn't the severe treatment of a father on a
7	very passive and very non-aggressive child, a very intro-
8	verted child, wouldn't that have some effect upon his
9	psyche that would affect his conduct in later life insofar
0	as becoming obsessed about something?
1	A Now you are not talking about September 1st and
2	October 5th? You are talking generally?
3	O Yes.
4	A It is conceivable if this was a pattern of inter-
5	action between the child and the father that it would have

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Portnow-cross

2 an influence.

Deing passive in nature and being non-aggressive, being non-pugilistic, so to speak, could in order to please his father, gain the love of his father, in order to live up to the standards of courage that his father is expecting of him, get into the area of collecting war paraphernalia

A No, that is not why he began to collect the war paraphernalia.

Q Why did he do it, Doctor?

A Mr. Dwyer from day one was ill, physically ill.

He was born with a pyloric stenosis, which is an inability of an infant to keep food down, so he had surgery. In addition, he had to compete with a brother with whom he was unable to compete; he attempted to get into athletics, but felt that he was not strong enough or could not coordinate well enough. He was unable to live up to what he considered to be his father's expectations. He slowly developed into adolescence, a shy, withdrawn, young man who had within him the idea that he really was not a man, that he really could not live up to the idea of what a man was in this family. And then his brother went into the Marine Corps, in addition, and that was injury upon

injury.

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In addition to that, he had a nystagmus, which is a shifting of the eves back and forth, and he has some degree of facial asymmetry, so that he saw himself basically as a defective man, as a man who didn't measure up in spite of his height and so forth. In order to compensate for his so-called deficiencies as he saw them and felt them, what he considered to be deficiencies, he decided that he was going to strengthen himself, he decided he is going to become a big man for what was weak within him and unable to compete, that he would develop this hobby in which he collected things which could, in fact, fill in for where he felt he was unable to function.

He collected guns, he collected military paraphernalia, all in an effort to bolster what he felt to be his lacking masculinity. To that extent the type of treatment which he experienced as a child between father and son played a role in his development, and particularly in why he picked a hobby which was geared to make up a really big man. After all, when you have 230 guns at home, "Don't mess with me," and you are a big man. And it doesn't make any difference whether you have a facial asymmetry or a nystagmus of the eve, does not matter whether you cannot compete in athletics, and even if your brother is a captain in the . wrine Corps, that makes you a big man.

O Now, Doctor, you described this as a hobby in terms of stamp collecting? You did dat on direct examination?

Portnow-cross

A Well, that was a rather poor example, stamp collecting.

O Can you give us a better example?

A Well, I tell you most of the examples I think of are examples that are not against the law or dangerous. But I have a friend who collects clocks, and you walk into his apartment and there must be 30 or 40 clocks on the wall ticking, sounding off, really very bizarre. He is a very functional guy, and any time there is a clock which he does not have that he sees advertised in the paper, he takes a day off from work, he runs down, he buys it, he finds a spot for it on the wall. Everybody thinks he is a little bit ill, but, in fact, he inctions, and he is a social worker.

- O This man is a social worker?
- A Yes.
- And that social work has no relation to the clocks? It does not help him in that particular hobby?
  - Λ no.
    - Is this man that you are talking about a married ()

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O Quite right. And I have discussed with you the

and October 5, 1974.

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factors that you have considered, that you have taken into account in making that determination, that more than a year before your report you say he was able to make his conduct conform to the requirements of law. We are going into those factors.

Now I am asking you when you discussed his hobbies--

A Yes?

O --I am asking you if all those factors that we discussed about your friend were absent from Mr. Dwver, would your opinion remain the same?

A Yes, it would. I knew all of the factors about his social life and his friendlessness, and that was all made known to me when I made my conclusion.

On In your experience, Doctor, have you known any-body like Mr. Dwyer who virtually is friendless, virtually has no social contacts whatsoever, having his occupation confined to the knowledge of the very things that he has been collecting all his life, a man who is withdrawn, as has been testified to, is reclusive, in all your experience have you known anybody like Mr. Dwyer? Have you ever treated a patient like Mr. Dwyer?

MR. LEVITE: Objection, your Honor, it is irrela-

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THE COURT: Yes, we are way off in the woods at this point. Sustained.

MR. DIAMOND: I beg to advise your Honor that
I am going to tie it up with this case. I have attempted
to establish an example only in the different area of what
I say to be monomania, and that is concentration upon one
thing to the exclusion of everything else. That is what
I have been attempting to establish, and I am asking him

- O Doctor, how long did you treat that patient?
- A Several years.
- Q What did you treat that patient for?

  MR. LEVINE: Objection, your Honor.
- A I was attempting to get this lady to be more friendly and less withdrawn.
- Q Over what period of time?

THE COURT: Go ahead.

THE COURT: He said a couple of years. This is the third time you are asking the question.

MR. DIAMOND: That is all.

BY THE COURT:

O Doctor, there were some questions asked about whether brain damage could occur through a high temperature associated with pneumonia. You said it is possible,

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2 but not probable.

A Your Honor, I think I did say that. I never saw it happen. But any time there is a high temperature the possibility exists.

had that in front of you at the time you examined the defendant?

A I did.

O Did you have any doubt that the Wechsler adult intelligence scale on page 3 reveals the defendant as a verbal IO of 144 and a performance IO of 120, and a full scale IO of 136?

A I have not seen the test protocol, but I have no reason to doubt the validity of the report.

O Would you agree with the doctor's further conclusion that with an IO of 130 an individual is capable of succeeding in any course or profession?

A That is no different than anyone else.

Q Yes.

A I will agree with that.

THE COURT: Any other questions?

MR. DIAMOND: May I ask one more question?
BY MR. DIAMOND:

0 What is a schizoid personality?

A A schizoid personality is a type of personality pattern designation which is given to people who cannot express anger and hostility a ectly by fighting for it. For example, they may collect things. There are also people who are very withdrawn and shy and people who do not relate well to other people. They have poor interpersonal relationships.

O'Connell's report. Would you turn to the last page, please, and the last paragraph.

There is evidence about--

MR. LITTLEFIELD: I object. May we approach the side bar?

MR. DIAMOND: It is in evidence.

MR. LITTLEFIELD: We object and wish to approach the side bar.

THE COURT: Come un.

(At the side bar.)

MR. LITTLEFIFLD: There are a couple of portions of the report I wish to refer to. On the first page it says the defendant is going to plead quilty, and later on, there is something on page 5, the last paragraph—

THE COURT: There is more than that.

MR. LITTLEFIELD: But on page 5, the last para-

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graph, it talks about a correctional institute, and so on. And in Mr. Dwyer's letters there was excluded that kind of

thing as irrelevant and prejudicial.

THE COURT: I was surprised when you put it in.

MR. DIAMOND: I appreciate this.

THE COURT: And there is part of Dr. Portnow's report which, Lord knows, he sets the whole thing out as if it was a confession.

MR. LITTLEFIELD: I would suggest with these items we not pursue them in front of the jury.

MR. DIAMOND: I appreciate that.

(In open Court.)

BY MR. DIAMOND:

O Doctor, you say you testified for the Government. How many times have you testified for the Government? Give an approximation.

A Maybe 40 to 45 per cent of my time when I testified.

Q How many cases in the past five years have you testified in?

A Oh, if I may be allowed to explain this, I evaluate maybe 10 or 15 cases before I get one in which I testify in. Are you asking me how many cases I am in volved in?

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might add, one very recently, in which I was retained by one side and decided the facts in behalf of the other side and ended up testilying for the other side.

as to him?

5, 1974?

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II .					
	A On	September	lst	and	October

O Yes. That is, going to the question of his preoccupation even before these events happened, would that have changed your opinion?

A No, not with reference to September 1st and October 5th.

> TR. DIAMOND: That is all. Thank you, Doctor. THE COURT: Step down.

(Witness excused.)

THE COURT: Ladies and gentlemen, it is now 4:30. Please have a nice weekend and be back here at 10:00 on Monday. We are going to finish this case on Monday, that you can be sure of.

However, during the weekerd keep an open mind; please don't talk about it.

Mr. Clerk, will you escort the jury from the room.

(Whereupon, an adjournment was taken to December 22, 1975, at 10:00 a.m.)

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## EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED 205a DECEMBER 22, 1975

mdjb \* \* \* \*

UNITED STATES OF AMERICA

V. 75 CR. 311

JOHN J. DWYER and JOHN S. DOBRANSKI

> December 22, 1975 10:15 a.m.

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(In open Court, jury not present.)

THE COURT: Do you have that examining doctor here?

MR. DIAMOND: Yes, I do.

THE COURT: You object to reopening the case at this point?

MR. LEVINE: Not only because it would be reopening the case, your Honor, but because the report on its
face doesn't include that the defendant has a mental
disease or defect in the first place.

Secondly, this physician didn't examine this defendant for those purposes at all, and it's just an incompetent report for purposes of this kind of inquiry, your Honor. On its face it doesn't include that he has a mental disease.

MR. DIAMOND: Dr. O'Connell did examine him

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for two purposes. The first was for treating him, and the second was to testify as an expert in this matter on the issue of mental disease or mental defect.

THE COURT: Did you say for treating him? he a treating physician?

MR. DIAMOND: Yes.

THE COURT: Is he treating the defendant? MR. DIAMOND: He was treated by Dr. O'Connell.

THE COURT: I will let you put him on.

MR. LEVINE: Your Honor, as far as the Government knows Dr. O'Connell did not examine the defendant for these purposes and I will hand up to the Court a letter written by Mr. Diamond to the Government which clearly states he wasn't examined for those purposes at all.

Now, your Honor, we have been furnished with a second report, apparently, by Dr. O'Connell which the Government would at least request an opportunity to read and evaluate, and even before this physician is put on the stand in front of the jury the Government would request that he be put on now and that we conduct a voir dire as to the competence for him to testify.

THE COURT: All right. Put him on the stand. JAMES J. O'CONNELL, called as a witness, having been first duly sworn, testified as

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## 207a

1	ndjb	O'Connell-direct 544
2	follows:	
3		THE COURT: You are a medical doctor, is that
4	correct?	
5		THE WITNESS: I am duly licensed in the State
6	of New Jerse	у.
7		THE COURT: And you practice psychiatry, is
8	that correct	?
9		THE WITNESS: Yes, sir, and neurology.
10		THE COURT: Go ahead.
11		MR. DIAMOND: Did your Honor want me to go into
12	his qualific	ations?
13		THE COURT: No.
14	DIRECT EXAMI	NATION
15	BY MR. DIAMO	ND:
16	QI	Or. O'Connell, did you examine the defendant
17	John Dwyer?	
18	Α :	Yes, sir.
19	. Q	What was the date of your first examination?
20	Α 5	September 11, 1975,
21	QI	oid you examine him at any other time and treat
22	him?	
23	Α )	es, sir, examined and treated him September
24	15th, Septeml	per 22nd, September 29th, sir.
25	Q I	hat did your examination show?

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1 mdjb O'Connell-direct 545 2 A The original examination showed there is evidence 3 of abnormal erotional illness in his makeup. There is every probability that he will improve if treated. The 4 5 trauma of his arrest and present ordeal would act as a 6 deterrent in the future. 7 Q Did you come to any opinion as to what that abnormality was? 9 A In my opinion it was psychoneurosin. 10 Q What's psychoneurosin? 11 A Psychoneurosin is a psychoneurosis. It's marked especially by lack of self-control in consequence 13 of which the patient is dominated by morbid fears or doubts. He has compulsions to unreasoning and consciously wrong or 15 foolish acts, fixed ideas and he suffers from a sense of 16 nervousness and unreality in himself and his surroundings. :7 Q Insofar as the psychoneurosin would apply to 18 Mr. Dwyer, what form did it take? 19 A It took the form of him adding to his collection 20 of weapons, of paraphernalia of the war, and flags and other things. In other words, it was a hobby that he indulged in because he had to. Q Was this to the exclusion of everything else? Was it an obsession?

It was an obsession in his life. His entire

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life has been devoted to this, sir.

Q Would you read from the report you just showed the Judge what your opinion is? That is the second report that you made.

A What I have had on all these factors and my knowledge and understanding of the patient gained from interviews, tests and treatment it's my opinion that on September 1, 1974, October 5, 1974, the accused person John Dwyer was in truth suffering from a mental disease or defect whic' eprived him of substantial capacity to conform his conduct to the requirements of law.

I have a further opinion, sir. It's my further opinion that the criminal acts charged against him on the above mentioned dates were the direct products of his mental disease or mental defect, and I have diagnosed that as psychoneurosin or an all-consuming obsession and overwhelming compulsion in patient Dwyer to deal and trade in weaponry and other trophies of warfare. This dominated his life and it ruled his behavior and conduct against his conscious will over which he had no control.

THE COURT: Did you want to cross?

CROSS EXAMINATION

BY MR. LEVINE:

Q Dr. O'Connell, when did you write this second

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210a 1 mdjb O'Connell-cross 547 report? 3 December 20th, sir. 4 That would be Saturday? 5 Yes, sir. 6 Mr. Diamond called you on Friday, I think, from 7 the courtroom, didn't he? 8 Possibly. 9 During the day? 10 He couldn't get in touchwith me. He may have 11 called me. I don't know that he called me. 12 When did you speak to him? How many times 13 have you spoken to him over the weekend? 14 I spoke to him Friday and Saturday. 15 And when did you speak to him on Friday? 16 About 7:00 at night. 17 Did he call you or did you call him? 18 He called me. 19 Going back. did you speak to him Friday during 20 the day? 21 He called my office and left a message that he 22 wanted me to come here immediately, and he must have called, 23 I don't recall speaking to him, he must have called later

in the day because I was there waiting for him at 7:00 at night.

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	2110
1	mdjb O'Connell-cross 548
2	Q You didn't speak to him during the afternoon?
3	A I may have. I don't recall. If I spoke to
4	him it was just relative to the meeting.
5	Q Relative to what meeting?
6	A The meeting at 7:00 Friday night, sir.
7	Q And that was a meeting or a telephone conver-
8	sation?
9	A It was a meeting.
10	Q And where was that?
11	A In my office at 1225 Livingston Avenue, North
12	Brunswick, sir.
13	Q What did he say to you at that meeting? What
14	was the purpose of the meeting?
15	A The purpose of the meeting was to acquaint me
16	with the testimony which had gone on here for so many
17	days.
18	Q And what was that testimony that he acquainted
19	you about?
20	A I can't give it in detail but in general it was
21	relative to the testimony which you people heard. I have
22	it incorporated in my report.
23	Q Please explain to the Court what he told you.
24	' A In my report I say "Having arrived at opinions
25	

and have considered not only the factors related above

1	mdjb O'Connell-cross 549
2	but also"
3	Q What page are you reading from, excuse me.
4	A The third page at the top.
5	Q Go on.
6	A "But also the recent Court testimony taken under
7	oath from various witnesses, among whom were family members
8	and a third grade teacher of the patient Dwyer, part of
9	this testimony is as follows."
10	Do you want me to read that?
11	Q Where did you get what you have here that appears
12	on page 3?
13	A What I am reading now in answer to your ques-
14	tion is what Mr. Diamond told me.
15	Q Did you read a transcript of the trial to get
16 '	these facts that you set forth on page 3?
17	A No, Mr. Diamond told me in general.
18	Q And he told youthen whatever facts appear
19	here on page 3, they have been told to you by Mr. Diamond?
20	A Not all the facts. Some of the facts were
21	told to meMr. Diamond repeated the facts that were told
22	to me by Mr. Dwyer in the several conversations I had.
23	Some of these things I knew.
24	When was the last time you examined Mr. Dwyer?
25	A September 29, 1975, sir.

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A Whether it is or not, I remember that unusual

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Q Okay, let's move on then. Line 6. "At the age of eight his father sent him some empty .50 caliber shells, patient responding by post card, thanks for the bullets, Dad. C n you please send me the machine gun."

Q What kind of similar knowledge?

I had all this knowledge that he had great

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is included in your report from October 5, 1975.

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O'Connell-cross 1 mdjb 553 A Scientifically that event corresponds with the 3 other events. They are all the same thing. Q Dr. O'Connell, let me repeat my question to you: 5 Did you know about this specific event prior to Friday evening? 7 A I knew of similar events. 8 Q Let's move on. Had you ever discussed politics with the defendant in your interview back in September of 10 this year? 11 A Yes. I discussed his uncle being a senator in 12 New Jersey. 13 Q Does that appear in your report of October 5th? 14 A No, it doesn't appear in any report. 15 Q What else did you discuss with him about politics besides the fact that he had an uncle who was a 17 state senator? 18 A Well, I can't remember. I didn't think that was relative to his case, no. If I did discuss it with 19 20 him I didn't write it down. 21 Q Did Mr. Diamond tell you that there had been 22 testimony at the trial that the defendant never voted? I 23 am directing your attention to line 9 of page 3 of the 24 report that you prepared on Saturday. Did Mr. Diamond tell 25 you that there was testimony at this trial last week that

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1	mdjb O'Connell-cross 554
2	the defendant had never voted?
3	A He certainly did.
4	Q And did he also tell you that there was testi-
5	mony at the trial last week from one of Mr. Dwyer's cousins
6	that the defendant was very interested in politics?
7	MR. DIAMOND: Your Honor, I object. He never
8	said he was very interested. He said he talked politics
9	once in a while.
10	Q That he talked about national politics, did
11	Mr. Diamond tell you that on Friday evening?
12	A He may have told me that, but I have no record.
13	Q You have no record?
14	A Right.
15	Q How about a recollection? Do you have any
16 '	recollection of it, apart from what's on the paper?
17	A Well, at that time it didn't seem important to
18	me, so I have no recollection.
9	Q But you wrote down that he has no political
20	beliefs. That was important to you?
1	A Yes. Especially with his uncle a senator.
2	Q Directing your attention to line 12, that his
3	father, a Naval veteran of the Pacific war, has made physi-
4	cal courage the guiding standard of his own life.
5	Did Mr. Diamond tell you on Friday evening

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1	mdjb	O'Connell-cross 556
2	. 0	Did he ask you to explain what you meant by
3	the words a	bnormal emotional illness?
4	Λ	Well, I knew enough to do that. He told me
5	that now we	were in the Federal Courts.
6	Q	And what?
7	A	And that I mustI don't know whether he said
8	it or not be	at I knew that I must give up my 40 years of
9	training wi	th the McNaughton Act.
10	Q	And do what?
11	A	And comply with the rules of Federal Courts.
12	Ω	And how were you going to comply with the rules
13	of Federal (	Courts?
14	A	To put in the Dawson Act, which has been modi-
15	fied by the	Federal Courts. He didn't tell me that.
6	Q	I don't understand.
7	A	He didn't tell me what to do. I knew what to
8	do.	
9	, Q	What did you know what to do?
0	A	Well, not to be too overt. I read the news-
1	papers, I al	so give lectures in forensic psychiatry at
2	Rutgers Stat	e University.
3	Q	And what did you know what to do?
4		From those two reasons.
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I don't understand. What were you going to do?

1	mdjb O'Connell-cross 557
2	A I was going to comply with the Federal Court
3	ruling, the American Bar Association or whatever you call
4	the ruling, if I thought that Mrlet me finish.
5	Q Go ahead, excuse me.
6	A If I thought Mr. Dwyer had a mental disease
7	or defect I was going to report in that manner and not I
8	don't think the McNaughton Act.
9	Q Where did the words mental disease or defect
10	come from?
11	A From the Federal Courts. They came from the
12	Durham Act. They came from that man hospitalized in St.
:3	Elizabeth's Hospital in Washington, Durham.
14	Q Did Mr. Diamond bring any books with him to
15	show the new testimony in Federal Courts?
16 '	A No, I gave him some books.
37	Q What books did you give him?
18	A Davidson's Forensic Psychiatry, possibly one
19	other one. I don't remember what others I gave him.
20	Q Prior to Friday evening had Mr. Diamond asked
21	you to write another report to explain your first report?
22	A Not that I recall.
23	(Continued on page 558.)
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mdlt 1 O'Connell-cross

Q Please review for the Court what the status
was for a potential appearance as a witness prior to your
conversation with Mr. Diamond on Friday evening?

A I didn't intend to appear here as a witness.

I was only going to give Mr. Diamond a report on the patient's condition.

THE COURT: You mean to say last week nobody asked you to come as a witness, until Friday?

THE WITNESS: I didn't say anything. I had no contact with the court.

THE COURT: Mr. Diamond didn't contact you?

THE WITNESS: Mr. Diamond asked me to come

another day, but there was some mix up and I didn't know

any details when I was supposed to come, or how, or what,

and I didn't come.

MR. DIAMOND: Your Honor, at the time of original trial --

MR. LITTLEFIELD: May we have the witness' testimony without Mr. Diamond's interruption?

THE COURT: When did Mr. Diamond tell you the case was going to trial?

Honor. The original idea was to advise Mr. Diamond what to do if this man was ill, and the original idea was that

O'Connell-cross

he was going on some program, some probation program, if I am correct in that and that's why I wrote the first report.

At some other time Mr. Diamond told me this case is going to federal court, and I didn't think that I would go. I wasn't keen in spending all this time going to New York.

Later, Mr. Diamond persuaded me out of the goodness of my heart that I should go. When that was, I don't know. I agreed to go. Then there was this mix up. You were sick, or something else happened --

THE COURT: Who was sick? Not me.

MR. DIAMOND: Yes, you were, your Honor. The first day you had a virus. It was on December 8th, and your secretary told us that, and that's why you were late and we didn't go that day.

THE WITNESS: There was some mix up. I hope I didn't say the wrong thing. And I didn't go.

Then Mr. Diamond told me he wanted me to go especially Friday, he called up from the court and said he wanted me to go. As a matter of fact, he wanted me Friday, but I didn't get the message until it was too late to come in.

THE COURT: On Friday night and Saturday did you talk solely with Mr. Diamond?

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O'Connell-cross

THE WITNES: Yes.

THE COURT: Was the client there?

THE WITNESS: No.

THE COURT: So you haven't seen John Dwyer since September --

THE WITNESS: The 29th, your Honor.

THE COURT: Do you have any other questions?

MR. LITTLEFIELD: We would request to approach the side bar or the robing room for a discussion of this matter.

THE COURT: All right. Let's go in the robing room.

(In the robing room.)

MR. BOYAN: May I be excused from this, Judge?

THE COURT: Surely.

MR. LITTLEFIELD: Your Honor, may I be heard now on four reasons why this witness should not be allowed to testify, which I have narr wed down to three.

The first is this Court has been misled all last week about the status of this witness being able to appear as a witness. Last Friday afternoon Mr. Diamond recited the fact this witness was scheduled to come in last Tuesday, but couldn't come in because we weren't ready for the defense's case at that point and therefore

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2 Mr. Diamond

Mr. Diamond said he did not come in that day.

The next time it arose was on Friday, and Friday Mr. Diamond told the Court on page 494 he talked to Mr. O'Connell in the afternoon and arranged for him to come up 10 o'clock on Monday morning.

We have heard two things from this witness'
own mouth. First, the date your Honor was sick was the
original date the trial was to begin. That was the last
time according to this witness Mr. Diamond and he discussed
his testimony, and at that point he said there was some
confusion, the confusion of you being sick, he didn't come.

be a witness until this Friday, which ended up in a
7 o'clock meeting friday night. That is absolutely con rary
to the story we heard all last week from Mr. Diamond how
the witness was waiting in the wings and couldn't come on
Tuesday because the government's case dragged on longer
than it was supposed to drag on.

That's the first point.

Secondly, this witness' testimony is .

essentially -- there is no way he can be an objective

witness based on his own psychiatric findings because

Mr. Diamond has been over the entire trial with him and

given him all the details he wants this doctor to take

O'Connell-cross

into account.

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If the doctor could have somehow testified on the basis of what he said in the initial report and findings that would be one thing, but now he has been irreparably influenced by the whole story of Mr. Diamond which went on Friday night.

Thirdly, your Honor, to allow this witness to go on at this point is completely unfair to the government. The government, assuming that the Court instructs the jury that there is even the remotest way for an insanity defense, since the first doctor said there was no mental disease or defect, the government has the burden of proving it is not the case.

After Dr. Portnow got on and gave his very thorough explanation of mental disease and defectant condition of this defendant, to allow this witness to now get on when we know Dr. Portnow cannot come back after he has been coached by Mr. Diamond on each of the points critical in this case, is utterly unfair.

I direct the Court specifically to the last paragraph of this report which deals with mental disease and defect and follows Mr. Diamond's line -- it is essentially a semantic thing, back and forth, and could go either way.

They have had it from one doctor. They can't now, after the government has put on its case, when the government has the burden, they cannot have a rebuttal, in view of Mr. Diamond's misleading of the court, and his essentially prompting the witness vis-a-vis all the facts that went on in this court when he met last Friday night.

The government cannot possibly have a fair trial if this is allowed under these circumstances .

MR. LEVINE: One further point, your Honor.

That is, all of a sudden we have a diagnosis here of a psychisthenia, and the testimony of this witness will be permitted to sail in unrebutted. I am not an expert, your HOnor. I don't know if that diagnosis is totally unfounded or even partially unfounded.

THE COURT: You are not Tom Murphy yet.

MR. DIAMOND: May I speak now, your Honor?

THE COURT: Yes.

MR. DIAMOND: Your Honor, I have never misled you, I have never deceived this Court. I did speak to him on Friday, I remember exactly the conversation. I will tell you how it all came about

when I originally was talking to Mr. Gold
about this matter I explained to Mr. Gold I knew Mr. Dwyer's
father, I knew the son, and that they were good friends of

mdlt O'Connell-cross

mine, and I was very, very deeply involved in this matter in my feelings toward them, and I recognized that he was caught in the act with no defense, but as I got to understand the situation better, I requested please consider him for the deferred prosecution program.

It was for that reason I had him examined initially by Dr. O'Connell.

Later on both Mr. Gold and Mr. Levine told me he did not fit into that program, and that therefore he would have to plead guilty.

In addition to that, just before we went to trial I received a call from Mr. Levine and Mr. Gold got on the phone also, and they told me that he would be permitted to plead guilty to one count of conspiracy, if he would testify against Mr. Dobranski.

Mr. Dwyer told me that he would rather go to jail for the rest of his life than testify against his friend, and I told them that, and I told them it was against his entire nature, that if I pressured him to do something like that, he would absolutely go to pieces and I wouldn't do it and therefore he would go to jail.

It was at that point I called Dr. O'Connell and asked him if he would come and testify. I told him when this trial would start and I told him to get ready for

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it -- I anticipated that the state, the government's case, would be in Monday, or perhaps Tuesday, and I told him to be ready for Tuesday or Wednesday.

when that happened we got here in court I believe on a Monday, and we found out that your Honor was sick, you had a cold, and your secretary told us this, we learned this, and your Honor suggested, I think the next day, Tuesday, that since I raised this defense of insanity that he be examined to determine whether he was competent.

As a result of that, I felt he should be examined not only by the government's doctors, but also by a doctor for the defense, so I called Dr. Herbert Spiegel and askedhim if he would do it and he said he couldn't do it but he would refer me to a friend of his, Dr. London, and I asked Dr. London to examine him for that purpose.

He examined him on the question of mental competency, that's what I asked him to do, but in discussing the matter with him, he told me that he believed that the man had a mental defect, and I said, "Well, in that case I can use your testimony in court."

But when he got on the stand of course, he instead of saying "defect" he said "disorder," and your Honor knows his testimony.

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And he was very upset.

In the meantime, I called Dr. -- I had also been in touch with Dr. O'Connell, and I think it was something like Friday I called him and asked him if he would be ready to testify, and he was very angry with me, and I said, "What's wrong?"

be ready to testify, and he was very angry with me, and I said, "What's wrong?"

He said, "You caused me to cancel out all my appointments, and on that day I was waiting for you to pick me up and you didn't pick me up and that's inexcusable."

I said, "I'm so deeply involved in this case,"
I apologized to him.

He said, "You have a New York psychiatrist, you don't need me, try not to use me."

I said, "I do need you, and I will keep in touch with you during the trial," and I did call him from time to time.

Finally, he said, "Let me know if you really need me."

I called him on Friday. I first got his secretary and she put me on the phone with him. I asked him, "Would you come in?" and he said he couldn't make it that afternoon. I'm sure if you asked him again, that he would say this "I can't make it," because I remember specifically when he first picked up the phone he called me

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O'Connell-cross

"Mr. Diamond," which is not his usual way of addressing me.

He said he couldn't come in that afternoon, it was already late, and he would come in Monday at 10 o'clock. That's the absolute truth. I will be willing to take a lie detector test. I'm sure if I took a polygraph it would come out I was telling the truth on that.

The next thing is this:

when I got to him Friday, Dr. O'Connell came
to me and said it would be very important to get these
facts in. He said they were under oath and they would be
reliable and this would be an important part of his report
since it would give him a deeper insight into these matters.

I went over there and related to him Friday, and as well I discussed with him on Saturday. On Friday, after I got back from Dr. O'Connell's home, I got a call from Dr. London, and I was very surprised, he called me at my home, and he said to me, "Did I do you any harm?"

I said, "No, Doctor, I know you tried to tell me the truth, you said defect, you are not a forensic psychiatrist, you are a treating physician and not accustomed to courtrooms and you get flustered and so forth."

He said, "What did Dr. Portnow say," because

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O'Connell-cross

he knows Dr. Portnow, and I told him.

He said to me, "Dr. Portnow is a whore. I met him in Bellevue Hospital, and he told me that this is a very sick man, this man should have never been indicted, and tried, and I absolutely had him upset about that, that that happened.

I said, "Would you come to court Monday and testify to that?"

He said, "I just can't do it."

I'm sure, your Honor, the record from his telephone, wherever he was calling from, would show that call
to my home in Freehold.

He said he wouldn't come in and testify, he couldn't do it, he would be ruined in his profession if he did it.

I wanted to tell your Honor also, when we made these arrangements for Mr. Dwyer to be examined, I asked his father to go along, to accompany him to the doctor so he could give some family history.

When Mr. Dwyer called me up -- and your Honor can put him on the stand and ask him and he will say exactly this, because obviously I couldn't have coached him because I didn't know this issue was going to be raised, he said, "Milton, I feel tremendous."

O'Connell-cross

I said, "Why?"

He said, "I didn't get much encouragement from Dr. London but Portnow was great. I know all the federal prosecutors down there and I will say 'What the hell are you doing, this man is so sick he shouldn't have been tried, 'and that gave me tremendous confidence and since the government's own psychiatrist says the boy is sick, I feel tremendous."

I can tell you frankly I was taken totally by surprise when Dr. Portnow gave the report that he did, that the man had absolutely no mental disease or defect, and insofar as he was concerned he was a hobbyist such as a stamp collector or something like that.

MR. LITTLEFIELD: The report of Dr. Portnow was mailed to Mr. Diamond ten days before he testified.

MR. DIAMOND: I have never received it to this day, your Honor, and I will take a polygraph on that as well, and he never mailed it to me or I would have gotten it.

Now, your Honor, I have been accused of lying to the Court. I take that very seriously, because I am not a liar. I may get emotionally involved in my cases, because I take every case seriously or I wouldn't take it. I have never lied to the Court and have the highest respect for the Court. I was deeply wounded when I was misunderstood.

about delaying the case, because it is not in my interest to delay the case, and I know your Honor sincerely felt we were.

what I am trying to say is I never got -- my mail comes in, my secretary gets it, I will bring my secretary here, I never got the report. The first time I saw it was when your Honor handed it to me.

THE COURT: Anything else?

MR. DIAMOND: One thing else, your Honor:

The prosecutor was kind enough to call my attention to the fact that when I asked that Dr. O'Connell's report be admitted into evidence that in the beginning here he mentions that -- he states that he is going to plead guilty, and he gives a history of having an arrest in New York State, Southern District, on October 5, 1974, for selling two submachine guns to a federal agent and attempting to sell two pistols to the same agent and states heis going to plead guilty, and on the last page, "We will be glad to make reports to whatever authority is authorized to subpoena him and also report and his attendance."

If it hadn't been for the fact the prosecutor was kind enough to call that to my attention, that probably would have gone in that way and would have been severely prejudicial to my client.

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## O'Connell-cross

THE COURT: I will think about it. I will be back in ten minutes.

MR. LITTLEFIELD: Does your Honor wish the government to provide authority for excluding the testimony under these circumstances.

THE COURT: Yes.

(Recess.)

(In open court - jury not present.)

THE COURT: There are a couple of questions.

One of them is house keeping. Do you move to withdraw
the former psychiatrict report, is that correct?

MR. DIAMOND: Yes, sir.

THE COURT: Do you object to it?

MR. LEVINE: Objection to the withdrawing of the O'Connell -- no, your Honor.

THE COURT: There are other ones, too.

MR. LEVINE: The Army?

THE COURT: Is there anything in the Army one that shouldn't be there?

MR. LEVINE: I don't think so.

THE COURT: There is another report, also, which discusses this case at great length.

MR. DIAMOND: Dr. Portnow. I would ask that that be withdrawn, sir.

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MR. LEVINE: I think the statements made by the defendant to psychiatrists are admissible as verbal acts.

THE COURT: They are verbal acts, but it still reads like a confession.

The motion to withdraw both are granted.

The government has requested I not permit

Dr. O'Connell to testify before the jury, is that correct?

MR. LEVINE: That's correct, your Honor.

THE COURT: The reasons both pro and con were gone into at great length in the robing room.

I don't think it is fair for Dr. O'Connell to testify. Under the circumstances, I am not going to let him testify in front of the jury.

Step down, Doctor.

Mark Dr. O'Connell's report of December 20, 1975 as a court's exhibit for identification.

(Court Exhibit 3 marked.)

MR. DIAMOND: Your Honor, may I just for a brief moment be heard?

THE COURT: Sure. I thought you were heard at great length inside.

MR. DIAMOND: I promise not to got at great length, your Honor.

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Your Honor, it is my understanding that under the Tatum case that where the defense offers some evidence of mental illness it is at that point that the burden shifts to the government to prove that the defendant was sane at the time of the act, beyond a reasonable doubt.

Your Honor, I submit that when Dr. London testified he testified as to this obcession and compulsion in nature, as he described it, of kleptomania, the man could not control himself, and, therefore, had no -- did not have the ability or the substantial capacity or lacked substantial capacity to control his behavior or conduct to conform to the requirements of the law.

I believe that is essentially what he said.

Under those circumstances, your Honor, and as I understand the Tatum rule, it is not necessary for him to use any magic formula such as saying the magic words "mental disease," or "mental defect", but it is at that point when even some evidence -- I think just some evidence, not conclusive evidence, but just some evidence of a mental abnormality that goes to that question, shifts the burden, and, therefore, your Honor, since Dr. London has already testified to that, I believe it was at that point that your Honor suggested that the government have its psychiatrist then testify, presumably because Dr. Portnow was going

away.

Your Honor, what I am trying to get at is this:

Since there has already been evidence by the defense as to insanity, I would ask the Court to reconsider its view and permit further evidence on this matter of a more clarifying nature because Dr. O'Connell who was the treating physician and had more knowledge of it than Dr. London, who was originally retained by the defense for the purpose of examining him on the question of competency.

Dr. London himself volunteered the fact, at least to me, the man had a mental defect, which was the reason we put him on the stand in the first place.

Since the Court has ruled that the prosecution was required to put on a psychiatrist, I would ask for two things:

First, a ruling that by reason of the fact that Dr. Portnow has testified the burden has shifted to the United States government to prove beyond a reasonable doubt the sanity of Mr. Dwyer at the time of the acts charged, and, secondly, I would also ask again that Dr. O'Connell be permitted to testify by reason of the fact of his inability to appear, by reason of the fact that he advised me that in order to make a valid and substantial opinion it

Honor?

would be valuable to have the testimony under oath of all the witnesses who testified. Because you're dealing with the liberty of a fellow human being I ask your Honor with all due respect, to reconsider his ruling.

THE COURT: No, I don't see any need to reconsider.

MR. BOYAN: May I be heard on this, your

THE COURT: Yes.

MR. BOYAN: Your Honor, in a conspiracy case

if I represent one of the defendants, I am also concerned

that trial tactics or method of presentation of evidence of

one of the co-defendants, if the jury in observing the trial

tactics or the presentation of evidence, has any reason

to think that there is any kind of sham or chicanery involved

that as human beings there is a certain tendency to

ascribe anything like that to all of the alleged conspirators.

I think it makes it that much more difficult for the jury to decide the guilt or innocence or each individual conspirator, alleged conspirator, no matter how strongly the Judge charges that the evidence against each conspirator must be evaluated separately as to the guilt of each.

I find myself in that kind of a case, where I

am representing John Dobranski, and where the co-defendant, through his attorney, in the opening statment, has stated that his defense was basically a defense of insanity.

We had the testimony of Dr. London go in,
we had marked as an exhibit Dr. London's report, which was
obviously for the purpose of substantiating this defense
of insanity, and I am not sure whether or not there was
any reference in the hearing of the jury to the fact that
another doctor might be offered by the defense this morning.

THE COURT: No, I don't believe there was.

MR. BOYAN: Now, not only is Dr. O'Connell not going to be here to testify, but Dr. London's testimony, I take it, is going to be stricken --

THE COURT: I didn't say that. I have no intention of striking his testimony.

MR. BOYAN: I see.

In any event, his report is now out, and, frankly, I don't see that the defense of Mr. Dwyer is going to have — the defense of insanity, I don't see that it is going to have an awful lot of substantiation based just on Dr. London's testimony and without Dr. London's report, and I'm sure that a lot will appear in the prosecution's summation about what a phony defense Mr. Dwyer tried to raise and how phony his entire defense must be, and even if the

prosecutor is very careful not to attribute any of that to my defendant, I think inevitably the jury is going to think in some of those terms.

could be avoided, and the interests of all could be protected, and that would be if your Honor withheld ruling finally as to the admissibility of Dr. O'Connell's testimony, allowed him to testify, and then put special interrogatories to the jury with respect to the guilt or innocence of Mr.

Dwyer generally, and whether or not the affirmative defense or the defense of insanity has been sustained.

Then your Honor would have the opportunity

to rule on the admissibility of the testimony, and if that

was the only thing that supported a finding in favor of the

defendant on the insanity defense, then that defense could

be stricken, and we would have the general finding of

guilty, and at the same time the jury would not have gone

through this experience of now you see it, now you don't,

with respect to the insanity defense, and, therefore, there

would be no adverse effect on my client.

adverse effect on your client. We are all going to do our best to make sure that that does not happen.

MR. DIAMOND: Just one more question, your

2 Honor.

THE COURT: Yes.

MR. DIAMOND: Your Honor, I would assume that the reason your Honor is excluding this is because of what the United States Attorney said to your Honor in the chambers, that he believes this was some kind of pre-arranged tactic on the part of the defense to put on a psychiatrist after the other psychiatrist left town, and if that is so, I would ask your Honor just for the record, and possibly review that Dr. O'Connell take the stand and be asked about whether or not there was any kind of such pre-arrangement or if it was as a result of misunderstandings that developed between us, and the problems that he had scheduling his cases, he is an extremely busy man, and cur conversation on Friday.

I ask that he be permitted to testify to the fact there was no pre-arranged plan on the part of the defense about this.

THE COURT: I don't think it is necessary for the doctor to take the stand. He has already testified.

Is there anything else, gentlemen?

Mr. Boyan, you indicated you wanted to call somebody for a short period of time this morning?

MR. BOYAN: Your Honor, I do want to call a

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March 25, 1975, and the government objects to it as irrelevant.

THE COURT: I don't know what relevance it has, but if you want it in you can have it in.

MR. LITTLEFIELD: I assume it is wanted in to show how Steven Smith pleading guilty on December 9, 1975, there was some promise made to him with respect to that plea since the government was ready for trial in March.

Since the jury won't understand what the significance of a notice of readiness for trial is, your Honor, the government would argue that no proper arguments can be made by counsel on the basis of that.

THE COURT: I don't know what the argument is going to be, but I will sit back and listen to it. If he wants to use it, I will let him use it.

Is there anything else now?

MR. DIAMOND: Just one thing more, and that is, back to Dr. O'Connell again, your Honor.

It occurred to me, your Honor -- it is my own view and I respectfully sugg to your Honor -- that by excluding the testimony of Dr. O'Connell reversible error is committed, and for the record, your Honor, I think the Court of Appeals would probably want to know the reasons why his testimony was being excluded, and I would ask your

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2	Honor to make findings of fact as to why he is excluding -
3	or conclusions of law, because I understand the United
4.	States Attorney said in chambers he was submitting more
5	to your Honor on the subject.
6	Therefore, I would ask most respectfully
7	that your Honor make findings of fact and conclusions of
8	law as to why the testimony of Dr. O'Connell is being
9	excluded.
10	If your Honor does that, I will then excuse
11	Dr. O'Connell and he will go home.
12	
13	THE COURT: I have no intention of doing it.  It is quite obvious.
	it is quite obvious.
i4	Is there anything else?
15	MR. DIAMOND: That's all, your Honor.
16	THE COURT: Are you going to rest?
17	MR. BOYAN: Yes, your Honor.
18	THE COURT: You rest also?
19	MR. LEVINE: Yes.
n	THE COURT: Nothing else?
1	MR. LEVINE: No, your Honor.
2	THE COURT: How long do you want for summation
3	MR. LEVINE: Initially, a half hour, your
4	Honor.
5	
- 11	THE COURT: Do you know the reverse twist on

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MILTON Digitalian, whether or not Dwyer said he was shy, it wasn't

just that that wasn't in quotes in the original notes, but

there was nothing in quotes in the handwritten notes

made at the time.

Then you have seen another witness, probably one who was on the stand shortest of all, Mr. Bartley, who testified that he saw the defendants come in a car and walk in the apartment. He wasn't cross examined at all because the defense didn't challenge what he said.

many occasions in a trial where I think cross examination has shed some very important light on the truth or lack of truth of what the witness was saying because he either could explain himself or he couldn't and had to change his story. That shows to you the tremendous value of cross examination.

Now, I couldn't cross examine Dwyer and say,
"Now, Smith says you told him in a phone call that you
were going to get BSJ to drive up, and who is BSJ, and is
it Dwyer?"

I couldn't do that because Dwyer never got on the stand. That means as far as my client is concerned it's one hundred per cent hearsay.

\* \* \*

USA vs. Dwyer

12/23/75 75 cr. 3 1 Charge

J. Duffy 3

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CHARGE OF THE COURT

(J. DUFFY)

Ladies and gentlemen, now that the testimony is over and the arguments are over, the time has come for you and me to do our part in the administration of justice. It is my province to instruct you as to the law, and you must accept my instructions on that. It is your function to determine the facts, and your decision on the facts is final and conclusive.

In considering the evidence and determining the facts in this case, you must lay aside any questions or considerations of sympathy. It is your duty as well as mine to administer justice fairly and impartially. In so doing, we must be guided solely by the law and the evidence, and neither you nor I can permit our conclusions to be affected by sympathy or suspicion.

You are to discharge your duty in an attitude of complete fairness and impartiality, as I emphasized when you were selected as jurors, without bias or prejudice for or against the Government or the defendants as parties to this controversy.

The case is important to the Government since
the enforcement of criminal laws is a matter of prime concern
to the community. It is also important to each defendant

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who is charged with a serious crime.

Before I turn to the indictment with which we are concerned here, there are a few general observations that I would like to make. I instructed you at the very start of the trial that your important function during the process of taking testimony would be to listen carefully to each witness as he testified and to observe him, and it has been evident to me, and I believe to counsel, that you followed this instruction. And so you are prepared to undertake your final duty.

In the discharge of that duty you perform a very high duty of citizenship. You are acting as ministers of justice. You members of the jury are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such differences as there may be in the testimony, and you members of the jury draw whatever reasonable inferences are warranted by the facts a you determine them.

It is your recollection of the facts which Should that recollection differ from anything governs. that the lawyers have said or even from my recollection, please disregard anything that we might say as far as the facts are concerned. If you want testimony or any part of

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731 it read back to you, it will be done at your request. 2 Of course, you will consider only the facts 3 which have been revealed at this trial. You are not to be influenced by anything that you might have read about, 5 mystery stories or criminal cases or anything that you heard 6 on the radio or the TV or anything else. It is only what 7 you heard here that counts. . At times during the trial I have been called upon to make rulings on various matters of law. I have sustained objections. Please don't concern yourself with 11 my reasons for so doing. Those were purely legal matters. 12 From time to time conferences at the bench 13 were conducted during the trial, either at the request of 14 the attorneys or at my request. These conferences dealt 15 solely with questions of law and logistics. They are of 16 no concern to you. You are not to draw any inference for 17 or against either side because of requests for such confer-18 19 ences. If during the trial I have said anything or 20 indicated anything in my questions or in my rulings which 21 may lead you to believe that I am inclined to favor one side 22

You have heard the summations of counsel. If

against the other, please disregard it. Any questions of

mine or any rulings were intended purely for clarification.

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you believe that counsel stated something as to which there is no evidence, disregard that part of what he said. Statements of counsel, I told you before, are not evidence. They are arguments of advocates, not evidence. Questions are not evidence. If any answer came from a witness that was stricken by me, do not consider that as evidence. The evidence is only the answers of the witness as you recall them, the testimony they gave, the exhibits which were received in evidence.

You heard the testimony here. How do you determine what weight you will give it? How do you determine whether to believe it or not? You heard it said before that you should use your own plain, common sense. That you should do. Do not be affected by considerations of sympathy or suspicion. Use your common sense.

You saw the witnesses. How did their testimony impress you? Did they appear to be testifying honestly and frankly? In evaluating their testimony and their credibility, you will apply your own common sense and experience, just as if you were handling an important matter in your own life when you decide whether or not you have been given a true picture of a situation.

You may consider the witness' demeanor, his lack of candor, his ability to express himself, his possible

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bias, his strength of recollection, the accuracy of the recollection. You may also consider whether the witness has a possible interest in the case. This does not mean that a witness who has an interest in the case would testify falsely just because of that interest. It is merely a factor that you may consider.

an interest in the case. It is a case that they have investigated and presented. You may consider that and give it whatever weight you feel it deserves. The fact/that a witness is an employee of the Government does not mean that you should give greater or lesser credit to his testimony. His testimony is to be scrutinized in the same manner as that of any other person.

The Government, I charge you is not to be considered in any different light than any other party to a lawsuit. Counsel for the Government must be considered in no different light than counsel for the defendants or any other litigant. The fact that the Government is a party entitles it to no greater or no lesser consideration than that accorded to any other party in a lawsuit.

Yea should also consider whether a witness'
testimony is supported or whether it is contradicted by
other believable testimony. If you find that a witness has

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made a material misstatement with the intention of misleading you, you may disregard it or you may disregard all of the testimony of that witness if you do not believe it, or you may accept that part which you believe and disregard the rest. All of these things you are to consider in determining credibility, believability, in determining where the truth lies.

There was testimony before you with respect to the use of an informer, or confidential informant. Wheever you may think of informers, whatever I may think of informers, the Government uses them in order to get leads to those who are violating the law. Whether you or I disapprove of that is really beside the point, provided that in no way the services of the informer impinge upon the rights of another person.

You are not being asked to determine whether or not you agree with the policy of using informers.

You also heard testimony from the witness

Smith, who has pleaded guilty to this crime. As such, he
is an accomplice. An accomplice is someone who unites with
another person in the commission of a crime voluntarily and
with common intent. An alleged accomplice does not become
incompetent to testify as a witness because of participation
in the crime charged. On the contrary, the testimony of an

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alleged accomplice, if believed by you may be of sufficient weight to sustain the verdict of guilty even though not corroborated or supported by other evidence. However, you should keep in mind that such testimony is always to be received with caution and weighed with great care.

In considering the evidence, remember it is the quality of the evidence that counts. It is not the number of witness, it is not the number of exhibits.

You may hear me from time to time refer to direct evidence and circumstantial evidence. It may be well for me to explain right now what the difference is between the two.

as to what he saw, heard or observed, what he knows from his own knowledge, something that came to him by virtue of his senses directly. Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

Circumstantial evidence, if believed, is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of either of the defendants.

Let me take an example to show you what I mean

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by circumstantial evidence. Let's suppose that when you came in this morning the sun was shining brightly, and let me suppose that I blacked out all the windows in the courtroom. Someone comes in with a dripping wet raincoat, and then, shortly thereafter, someone comes in with an umbrella that is also dripping wet.

Now, in my hypothetical you can't see out the windows, so you can't know whether it is raining, through your own senses. But circumstantially, from the combination of facts which I have suggested, you could know, and you could say, that it was raining.

That's all there is to circumstantial evidence.

You infer, on the basis of reason and experience, from the established fact to the existence of some other fact.

Let me touch on some other preliminary matters. The indictment returned by the grand jury contains several separate charges, or counts. The first count, the conspiracy count, charges that the two defendants and one other person conspired to violate the federal laws governing the transfer and possession of firearms. The other counts, which I will hereafter refer to as substantive counts, charge John J.

Dwyer and John S. Dobranski, the defendants here on trial, along with Steven Laith, with actual violations of that part of the law which governs the transfer and possession of

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firearms.

I must explain and you must understand that guilt is personal. The guilt or innocence of each defendant on trial must be determined with respect to him solely on the evidence presented against him or the lack of evidence. The charges against him stand or fall on the proof or lack of proof against him and not upon proof as to any other defendant or any coconspirator.

At the beginning of this trial I emphasized certain principles of law. I will repeat them to you now. The indictment is merely an accusation, a charge. It is not evidence nor proof of a defendant's guilt. No weight is to be given to the fact that an indictment was returned against the defendant. They each pleaded not guilty. Thus, the Government has the burden of proving the charges against each of them beyond a reasonable doubt.

The defendant does not have to prove anything.

He is presumed to be innocent. The presumption of innocence was in his favor throughout the entire trial. It continues in his favor even as I instruct you now.

The burden of proof never shifts. The Government must prove its case beyond a reasonable doubt. The defendant is not called upon to prove his innocence. The defendant has the right to rely upon the failure of the

Government, the prosecution, to establish proof beyond a reasonable doubt. It may rely upon testimony brought out on cross examination.

Mention was made that a defendant did not testify. Please. There is no reason why you should speculate as to why. There are many reasons why a person would not want to testify. He may feel, because of the strain of being a witness, the tension, that he may not be calm. He may be embarrassed by his lack of education or his inability to speak well in front of a group of people. You are not to speculate on these things. You are not to draw any inference whatsoever from the defendant's failure to take the stand.

The presumption of innocence to which I referred is removed only if and when you ladies and gentlemen of the jury are satisfied that the Government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

The question might come up in your mind What is a reasonable doubt? The words almost define themselves: that is, a doubt founded in reason, arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person would have after weighing carefully all of the evidence.

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A reasonable doubt is a doubt which appeals to your reason, your judgment, your conscience, your experience. It is not a caprice or a whim, it is not speculation, it is not conjecture, it is not suspicion, it is not an excuse to avoid the performance of what someone might consider an unpleasant duty, it is not sympathy.

of the evidence, you can candidly and honestly say that you are not satisfied as to the guilt of the defendant, that you do not have an abiding conviction of the defendant's guilt, if you should have such a doubt as would cause you, as a prudent person, to hesitate before acting in matters of importance for yourself, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

On the other hand, if, after an impartial and fair consideration of all the evidence, you can candidly and honestly say that you have an abiding conviction of the defendant's guilt, such a conviction that you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt and under such circumstances it is your duty to convict.

One final word. Proof beyond a reasonable doubt is not proof to a positive certainty. If this were

the law, few persons, however guilty, would ever be convicted.

It is practically impossible for a person to be absolutely

and completely convinced of a controverted fact, which by

its nature is not susceptible to a mathematical certainty.

The law in a criminal case is that it is sufficient if the guilt of the defendant is proved beyond a reasonable doubt, not beyond all possible doubt.

I told you there were two types of charges in the indictment, conspiracy and the substantive counts. Each charge is a separate or different, crime. I have already mentioned that in count one there is charged a conspiracy to violate the federal gun control laws, whereas the substantive counts charge particular defendants with committing an actual violation of those laws.

A conspiracy to commit a crime is an entility different and separate offense from the substantive crime which might be the objective of the conspiracy. The essence of the crime of conspiracy is an agreement or understanding to violate the law. Thus, if a conspiracy exists, even if it should fail in its purpose, it is still punishable as a crime. Since the essential elements which the Government must prove in order to sustain the respective charges in the conspiracy count are different than those required in the substantive counts, we will consider the requirements

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separately.

"From on or about the 27th day of July 1974, up to and including on or about the 7th day of October 1974, in the Southern District of New York, Steven J. Smith, John J.

Dwyer and John S. Dobranski, the defendants, did wilfully, unlawfully and knowingly combine, conspire, confederate and agree together and with each other and with others persons to the grand jury unknown to commit certain offenses against the United States, to wit, to violate Sections" -- and there are certain numbers put in thereafter.

The indictment then continues: "It was part of the conspiracy that Steven J. Smith, John J. Dwyer and John S. Dobranski, the defendants, would transfer certain firearms, to wit, (1) a 9 mm. German submachine gun, Model MP 45, Serial No. 7284; (2) a 7.62 mm. Russian submachine gun, Model PPSM, Serial No. 3070; and (3) a 9 mm. Husq warna Vapenfabrics AB with attachable shoulder strap, a short barreled rifle, Serial No. D6865, in violation of the provisions of Title 26, United States Code, Sections 5811, 5812 and 5861(e)."

The violation charged in the conspiracy count is a violation of Title 18, Section 371. That provides, in pertinent part, that if two or more persons conspire to

commit any offense against the United States, and one or
more of such persons do any act to effect the object of
the conspiracy, each is guilty of the offense.

In order to convict a defendant on trial, the Government must prove beyond a reasonable doubt the following essential elements: first, the existence of the conspiracy charged in this indictment; second, that the defendants knowingly and wilfully associated themselves with the conspiracy; third, that one of the conspirators knowingly committed at least one overt act set forth in the indictment at or about the time alleged.

a conspiracy? The idea of a conspiracy is simple. A conspiracy is a combination, agreement or understanding of two or more persons by concerted action to accomplish a criminal or unlawful purpose, in this instance to violate the possession and transfer portions of the federal Gun Control laws. I will explain those laws to you later in connection with the substantive counts.

however, in order to find a criminal conspiracy did exist, you must find that the weapons described in the indictment are in fact firearms as defined by the law.

The term "firearm" is defined to include a machine gun and a rifle having a barrel or barrels of less

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than 16 inches in length, and a weapon made from a rifle, if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length

How, one section of the law defines a machine gun. The term "machine gun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot without manual reloading by a single function of the trigger.

The term also includes the frame or receiver of such a weapon, any combination of parts designed or intended for use in converting a weapon into a machine gun, or any combination of parts from which a machine gun can be assembled, if such parts are in the possession or under the control of a person.

Another section of the law defines "rifle" to be a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder, and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifle bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

Let's get back to talking about the conspiracy.

The gist of the crime of Conspiracy, as I said, is the unlawful combination or agreement to violate the law. As I said, the success or failure is immaterial.

not required to show that two or more persons sat around a table and entered a solemn pact, orally or in writing, stating that they are going to form a conspiracy. Nor is the Government required to prove the details or means by which the objectives were agreed to be achieved.

in fact undertaking to enter into a criminal conspiracy much is left to unexpressed understanding. But the evidence must show, in order to establish that a conspiracy existed, that its members in some way, through some contrivance, impliedly or tacitly came to a common understanding to violate the law and to accomplish the unlawful plan.

In determining whether there has been such an unlawful agreement, you may judge the acts and conduct of the alleged members of the conspiracy which are done to carry out an apparently criminal purpose. Furthermore, items of evidence are not to be viewed in isolation but in conjunction with one another and upon the totality of all the evidence.

A conspiracy has sometimes been called a partner-

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ship for criminal purposes, and in a partnership each member becomes the agent of each other. You must first determine whether or not the proof establishes the existence of the conspiracy charged in the indictment.

In deciding this first element, you must consider all of the evidence which has been admitted and the reasonable inferences to be drawn therefrom. It is sufficient, to establish the existence of a conspiracy, if from the proof of all the relevant facts and circumstances you find beyond a reasonable doubt that at least two alleged coconspirators met in their minds in an understanding way to accomplish by the means alleged one or more of the objectives of the conspiracy as charged in this indictment.

If you do not conclude that the charge of c-nspiracy did exist, you must acquit. If you do conclude that the charge of conspiracy did exist, then you next determine whether the defendant was a member.

As I said, guilt is personal and you must consider each defendant separately. His participation in the conspiracy, if you find one did exist, must be established by the independent evidence of each defendant's own acts, statements and conduct and the reasonable inferences to be drawn therefrom.

To find a particular defendant was a member of

a conspiracy, you must be satisfied beyond a reasonable doubt that, aware of its purposes, that defendant, that particular defendant, was a willing participant, with intent to advance those purposes. If you do so find, then, however limited his role might have been in the furthering of the objectives of the conspiracy, we is responsible for all that is done in furtherance of the conspiracy.

Once you are satisfied, and you must be satisfied beyond a reasonable doubt, that a conspiracy existed and that a particular defendant was a member of the conspiracy, then the acts and declarations of any other person whom you also find was a member of the conspiracy made by the coconspirators during the existence of the conspiracy are considered the acts and declarations of all the members of the conspiracy, even if they were not present at the time.

I told you during the trial about taking evidence subject to connection. I did not explain it then, but I have just given the explanation. Let me repeat it. Once you find that a conspiracy existed and that a particular defendant was a member of the conspiracy, then the acts and declarations of any other person whom you find was also a member of the conspiracy made during the existence of the conspiracy and in furtherance of its objectives are considered

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the acts and declarations of all of the members of the conspiracy.

Summing it up in a simple way, if you find in fact that there was a partnership in crime, each partner acts and speaks for the others in furtherance of the partnership business.

The existence of a conspiracy, of course, may be established either by direct or circumstantial evidence.

Either will suffice, if you are convinced beyond a reasonable doubt by such evidence.

In this case, the Government relies upon both direct and circumstantial evidence. If the reasonable inferences to be drawn from any evidence leads you to two conclusions, one favoring guilt and the other one innocence, it is your duty to take that which favors innocence. The reason for this is that, if such an inference is reasonable, then you may have a reasonable doubt.

whether a defendant intentionally and knowingly participates in a claimed conspiracy presents another issue of fact. This concerns what is in one's mind. Science has yet to devise any instrument whereby we can go back in time and determine what a person's then intent or knowledge was. It's got to be determined from that person's acts, conduct, the surrounding circumstances, and such inferences

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as may be reasonably drawn therefrom.

For a defendant to be found guilty, you must find that the defendant participated with knowledge of at least some of the purposes of the conspiracy and with an intent to aid the accomplishment of its unlawful end. If you find that the Government has sustained this element as to each defendant's participation, then we reach the next element.

I mentioned already that the third essential element of the crime of conspiracy is that there be an overt act intended to effect the object of the conspiracy.

An overt act is a step, an action which is taken to achieve, accomplish and further the objectives of the conspiracy.

The overt acts here charged are:

"One. On or about September 1, 1974, at approximately 1.00 p.m., Steven J. Smith, John J. Dwyer and John S. Dobranski met at 169 Oakwood Drive, Building 14, Peekskill, New York."

Now, that first overt act certainly does not charge a crime. An overt act does not need to be a criminal act, nor need it be the crime charged in the indictment.

The second overt act charged states that on or about September 1, 1974, at approximately 1.30 p.m.,

Steven J. Smith, John J. Dwyer and John S. Dobranski transferred two submachine guns, to wit, a 9 mm. German submachine gun, the same model and serial number, and a 7.62 Russian submachine gun with the model and serial number listed thereafter.

The third overt act charges that on or about October 3, 1974, at approximately 3.00 p.m., Steven J. Smith, John J. Dwyer and John S. Dobranski met at 169 Oakwood Drive, Building 14, Peekskill, New York.

Obviously, as I said, an overt act by itself
may well be innocent conduct. But if it was for the pose
of furthering the purpose of the conspiracy, then that
event sheds its innocent appearance, it is an overt act
committed by the conspirators in furtherance of the
objectives of the conspiracy.

It is not necessary for the Government to prove that each member of the conspiracy committed each overt act since, as I said, the acts of one member of the conspiracy become the acts of all of the members of the conspiracy.

The Government is not required to prove each and every overt act alleged in the indictment. It is sufficient if it proves the commission of at least one of those overt acts in the Southern District of New York.

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I charge you that Peekskill, New York is located within the Southern District of New York.

The times alleged in the indictment need not be specifically proved. It is not required that the Government prove that a conspiracy started or ended on a certain date or that the transfer took place at a certain time. It is sufficient if you find in fact the conspiracy was formed and existed for a substantial period of time within the period set forth in the indictment and that at least one of the overt acts was committed in furtherance of the objectives within that period.

the indictment existed between any of the alleged coconspirators, you must decide as to each defendant whether he joined the conspiracy with knowledge. In determining that, each individual is entitled to individual consideration, including any evidence of his knowledge or lack of knowledge, his status, his participation in key conversations, his participation in the plan, the scheme, the agreement.

Now let me turn to the substantive counts. The next count of the indictment involving the defendants on trial reads in part as follows:

"That on or about the 1st day of September 1974, in the Southern District of New York, Steven J. Smith,

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John J. Dwyer and John S. Dobranski, the defendants, unlawfully, wilfully and knowingly did transfer certain firearms, to wit, a 9 mm. German submachine qun," with the model number and serial number, "a 7.62 Russian submachine qun," with the model and serial number, "in violation of the provisions of Title 26, Sections 5811 and 5812," that is without having filed with the Secretary of the Treasury or his delegate a written application to transfer and register the said firearms to the transferee, and without having secured the approval of the Secretary of the Treasury or his delegate for the transfer and registration of said firearms to the transferee, and without having paid the tax due and payable on the transfer."

The indictment thereafter lists certain section numbers. As I said, this substantive count is a violation of certain sections of the law. In pertinent part, those sections provide that it is unlawful for any person to transfer a firearm in violation of the provisions of the entire sub-chapter on gun control. Included in those provisions are Sections 5811 and 5812 of Title 26, United States Code.

Section 5811 relates to transfer taxes. It sets a certain rate for a transfer tax and it says that the tax imposed by subsection (a) of this section shall be

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paid by the transferon

Section 188

follows:

"(a) Applic

transferred unless
"(1) the

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Section 1812 provides in pertinent part as

"(a) Application: A firearm shall not be transferred unless:

"(1) the transferor of the firearm has filed with the Secretary or his delegate a written application in duplicate for the transfer and registration of the firearm to the transferee on an application form prescribed by the Secretary of the Treasury."

Of course, that section provides that the tax also shall be paid.

It further pro ies that the application form show that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee:

"Application shall be denied if the transfer, receipt or possession of the firearm would place the transferee in violation of the law."

In order to find the defendants or either of them guilty of illegally transferring the machine guns charged in count two, it is necessary for you to find beyond a reasonable doubt four elements:

First, that on or about September 1, 1974, the

defendants transferred a firearm, as that term is defined

in the statute;

Second, that the transfer ecurred in the

Second, that the transfe coursed in the Southern District of New York;

Third, that the transfer was in violation of the law because the person transferring it had not filed a written application with the Secretary of the Treasury or his delegate, or he had not paid a transfer tax, or he had not obtained the approval of the Secretary of the Treasury or his delegate;

Fourth, that the transfer was unlawfully, wilfully and knowingly done.

Let me take care of two of the elements immediately. I charged you before, and I again remind you, that Peekskill, New York is in the Southern District of New York.

As to the third element, the Government relies upon the certificates which were produced as to the non-registration and non-filing of the applications.

Let's get back to the first element, then.

What is a transfer? The statute also describes what a transfer is. The term "transfer" and various derivatives of the word include scilling, assigning, pledging, leasing

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loaning, giving away or otherwise disposing of. Impliedly thereafter comes the words "a firearm."

The certificates which were produced by the Government are evidence - that is, that no application was made, or no tax was paid, or that the Secretary of the Treasury did not approve the transfer. And note, please, that these are in the alternative. You still must be convinced beyond a reasonable doubt as to those things. You need not find each one of the trhee. Any one will be sufficient.

The evidence does show, however, that certificates, which you may have to look at, show that after a diligent search of the national firearms and registration transfer records, no record was found that the machine ouns which the Government claims were involved in this case were registered, and from that, if you are convinced beyond a reasonable doubt, then you may conclude that the Government has sustained its burden on that.

The fourth element I mentioned, unlawfully, wilfully and knowingly. What does it mean? It means that a defendant knew what he was doing, that he did it deliberately and voluntarily as opposed to by some kind of mistake or accident or as the result of some coercion.

It is unnecessary that the Government prove that

a defendant knew he was violating a particular law. It is unnecessary that the defendant knew that an application for the transfer and registration had not been filed, or that the approval of the Secretary or his delegate had not been secured, or that the tax on the transfer had not been paid. You need only find that the defendant knew that there was a transfer, and the nature of the instrument transferred.

Of course, it is not incumbent upon the defendant to convince you that he did not know the items were firearms. The burden of proof is on-the Government to prove beyond a reasonable doubt that the defendant had requisite knowledge.

The Government need not convince you that the defendants knew the definition of the term "firearm" as contained in the law, but you must be convinced beyond a reasonable doubt, with respect to any one of these items, that the defendants in fact knew that they were firearms within the ordinary meaning of that term in every day speech.

The next count of the indictment with which we are concerned charges that on or about the 5th day of October 1974, in the Southern District of New York, Steven J. Smith, John J. Dwyer and John S. Dobranski unlawfully,

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756 wilfully and knowingly did receive and possess a firearm, to wit, a 9 mm. Husqvarna Vapenfabrics AB with attaching shoulder stock, a short barreled rifle, with a serial number, which firearm was not registered to any of them in the national registration and firearms transfer records.

Section 5961 of Title 26 provides in pertinent part that it is unlawful to possess a firearm which is not registered in the national firearms and transfer records. In order to find the defendants or either of them committed this offense, the possession count, you must find beyond a reasonable doubt the following four elements:

That on or about October 5, 1974, they had possession of a firearm, as I have already defined that

Second, that it took place in the Southern

Third, that the firearm was not registered in the national firearms registration and transfer records; and

Fourth, that the possession was unlawful, wilful and knowing.

I have already defined the terms "unlawful, wilful and knowing." I know that you know what the term "possession" means. But the law recognizes two types of

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possession, actual possession and constructive possession.

A person who has knowingly had direct physical control over a thing at a given time is then in actual possession. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion and control over a thing either directly or indirectly or through another person then is said to have constructive possession of it.

Let me give you an example. If I walk into a hotel with my wife and I give to the bellboy the suitcase, as he is bringing us upstairs I still have control and discretion over that suitcase and I have constructive possession.

But possession may be either sole or joint. In other words, more than one person may have possession of it. Actually, the bellboy might have possession of it; but you better believe, if I am in there with my wife and it contains her clothing, she's got constructive possession of it also.

so possession may be a sharing of actual or constructive possession. It can be that more than one person possesses a thing at one time.

As to the second element, for the third time

I remind you that Peekskill is in the Southern District of

New York.

As to the element of the crime involving nonregistration, I mentioned in my earlier instructions about
the first substantive count that the certificates which
the Government put in should be considered by you as
evidence, not binding upon you but should be considered
by you.

There was also a stipulation entered into by counsel for the Government and the defendant Dobranski that also should considered by you.

Now, the substantive counts also charge the defendants with aiding and abetting. There is a section in our law that says whoever aids and abets in a crime, or counsels, commands, induces or procures its commission, is guilty of the crime which is committed.

There is no precise rule as to what constitutes aiding and abetting. It is enough if a defendant in some manner associates himself with an illegal venture. If you find that a defendant participated as something which he wished to bring about or that he sought by his actions to make it succeed, that is sufficient. One who aids and abets another in the commission of a crime is equally as guilty as the person who actually physically committed it.

If you find beyond a reasonable doubt with

respect to the two substantive counts that a defendant aided and abetted in the transfer of the guns described or in the possession of the gun described, you may find that defendant guilty of such offense.

The defendant John Dwyer contends that at the time of the acts charged here that he was insane as the law defines that term; that is to say, that by virtue of a mental disease or defect he was not responsible for his conduct.

Of course, the burden of proof never shifts.

It is on the Government to prove beyond a reasonable doubt that the defendant was responsible, that is to say, he was sane, during the period in question.

The law defines "insanity" for the purposes of responsibility for criminal conduct as follows: "A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

Please note, under this definition, any lack of capacity must be the result of a mental disease or defect.

If it is due to some other reason, it does not make a man insane, under the definition. There must be a lack of

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capacity due to this mental disease or defect, and that lack of capacity must be substantial.

may be either lack of capacity to appreciate the wrongfulness of conduct or the lack of capacity to conform conduct
to the requirements of law. One or the other is enough,
under these circumstances, to make a man insane. It need
not be both. The mere fact that a man repeatedly engages
in criminal conduct does not in and of itself justify a
rinding that he is insane.

defendant Dwyer, before you can find him guilty on any charge, you must find that John Dwyer was mentally capable of knowing what he was doing, was mentally capable of knowing that it was wrong and was mentally capable of controlling his conduct.

How, on the subject of defendant's responsibility there has been quite a bit of testimony. There has been testimony from expert witnesses, psychiatrists. You are not, by any means, limited, in consideration of the question of sanity, to the opinions of the doctors. You are entitled to take into account, and should take into account, any other evidence that you believe relates to that issue, including evidence as to whether the defendant's conduct

was wilful.

You heard evidence, for example, that John
Dwyer's father whipped him some thirty years before the
incidents involved. You am consider that, and you
should. You heard evidence from his third grade teacher,
which I guess would be twenty five years before, and then,
following, you heard evidence concerning letters written
to that third grade teacher.

You are to construct all of this testimony, but you are not to be influenced by sympathy or suspicion.

You are to consider it to find out whether in fact John

Dwyer was suffering from a mental disease or a defect sufficient so that it comes within that definition which I gave you, so that he lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Ladies and gentlemen, you were paying very close attention to the evidence. Your recollection is the only one that counts. You heard Agent Joe Kelly testify that he purchased the two submachine guns from the defendant Dwyer on September 1, 1974.

You heard the informer Pete Costabile testify that he was present during the transactions. You heard the defendant Smith testify as to the same thing. You

heard them testify that the defendant Dwyer was there and the defendant Dobranski was present.

You also heard these witnesses and Agent Bartley testify that the defendants were present on October 5, 1974 when there is some evidence that the defendant Dwyer brought the short barreled rifle to Smith's apartment.

There was also evidence that the defendant Dobranski called the contents toys.

Agent Gunnar Erickson testified as an expert that the submachine guns and the short rifle were firearms within the definitions of the Gun Control Act.

You heard the testimony of the Dwyer family about the upbringing of the defendant Dwyer. You should consider all of the testimony. Of course, in determining the truth, you can consider the discrepancies, if any, among the witnesses.

Government and the defendants have reviewed in detail the evidence and emphasized their respective contentions. I must remind you once more that their recollection is not binding upon you, that it is your recollection which governs. You are the sole judges of the facts. I can't emphasize that too much.

The Government, to prevail, must prove, with

respect to each count, the essential elements which I listed beyond a reasonable doubt. If it succeeds as to a particular count, your verdict must be guilty. If it fails, your verdict should be not guilty.

You are to consider each count separately and render a separate virdict as to each count. You must consider each individual separately and render a separate verdict as to each defendant. In so doing, you are not to consider the question of punishment, if any. That is a burden. if you find the defendant, either defendant, guilty, which rests solely on me. It is a heavy responsibility but one which I alone bear.

You may render a verdict of guilty on each count or a verdict of not guilty on each count, guilty on some counts and not guilty on other counts. That is solely within your province. There will be twelve of you on the jury who will deliberate. The twelve of you must arrive, if you are going to find a defendant guilty, at a unanimous verdict.

No one should enter into the deliberations in the jury room with such a pride of opinion that he or she would refuse to change it if convinced by an intelligent argument on the part of another juror. However, you shouldn't do violence to your own well founded opinion.

You are entitled to it. Each of you must decide for himself or herself after thoroughly reviewing the evidence and exchanging views with the other jurors.

If you wish any of the exhibits, you may see them in the jury room. If you wish any of the testimony read to you, it will be read to you.

This is a important case. Handle it as an important matter. Decide it solely on the evidence and the law as I have charged it to you. Do not be influenced by sympathy or suspicion.

All right, gentlemen.

(At the bench)

of exceptions to that charge. But it is as fair as you are going to find one.

Counsel, do you have any exceptions?

MR. BOYAF Vour Honor, I agree that it was generally a very fair charge and I take exception to nothing that was charged. But I do request something specifically directed to the admissibility of the hearsay against Dobranski, the hearsay statement by Smith that Dwyer referred to B. S. J. as the person who would transport him up there and the hearsay from the letters from Dwyer.

At the time they were offered, there was an

1 mdjg 37

objection that they were not admissible against Dwyer unless connected up, and your Honor said it would be admitted subject to it being connected up.

We now find from the summation of the Government, both the original and the rebuttal, that that hearsay is the principal reliance in establishing that Dobranski was culpable, and I think we have a classic case of the worst type of bootstrap effect that you get in conspiracy cases where the hearsay is admissible only if there is a conspiracy but it is hearsay that proves the conspiracy.

THE COURT: 1 understand. All right.

MR. LITTLEFIELD: May the Government respond, your Honor?

THE COURT: No.

MR. LITTLEFIELD: Our position 's that you found that clearly there is evidence to show he was a member of the conspiracy. I can't believe Mr. Boyan at this time --

MR. BOYAN: Can I complete my request, your

Honor?

THE COURT: Sure.

MR. BOYAN: What I would really like is an instruction to the jury that they may not consider this hearsay against Dobranski unless from other evidence in the case they find that Dobranski was a member of the

1	ndjg 38 766
2	conspiracy.
3	MR. LITTLEFIELD: That is just not proper.
4	THE COURT: I heard your request and I am just
5	not going to charge it.
6	MR. DIAMOND: Your Honor, I would refer you
7	to these charges. The main thing that I am interested in
8	is the case here of Doyle v. U.S., 222 U.S., which says
9	THE COURT: We'll go into the robing room.
10	(In open court)
11	THE COURT: Ladies and gentlemen, we have again
12	one of those logistical problems. The Clerk will escort
13	you out. Please don't start deliberating yet.
14	(In the robing room)
15	MR. DIAMOND: Your Honor, initially I would
16	ask you to give the instructions that I have already
17	submitted to the Court.
18	THE COURT: Those instructions, except for very
19	slight changes, because I wasn't happy with the words, were
20	given.
21	MR. DIAMOND: The second thing, Judge, is I am
22	referring to the Doyle case, Doyle v. U.S., where it says
23	"It is plainer to give instructions that leaves to the jury
24	to determine whether sufficient evidence of insanity has
25	been introduced to discipate the initial presumption of

mdjg 39

2 sanity."

Judge, as I understand it, the Court itself must instruct the jury that where the defendant has introduced some evidence of insanity, the burden then shifts to the Government; that unless they believe that the Government has proved sanity beyond a reasonable doubt, that they must acquit the defendant.

I would ask your Honor to instruct on that:
stated otherwise, that I have found that there has been
sufficient evidence of insanity introduced, which now
shifts the burden to the Government, and unless you believe
that the Government has proved the sanity of the defendant
Dwyer, then you must acquit him.

That's the substance of it.

THE COURT: I am not going to charge it.

You have an exception.

MR. DIAMOND: Next, I would ask your Monor to consider a charge on entrapment, which really didn't occur to me until I heard some of the testimony in this case.

Your Monor, we submit that Costabile, having described Dwyer as a shy man and indicating that he might not come up because he is shy, that a jury could properly infer from that that within that three day period before he did come up. Costabile may have committed acts to induce him, to

768 1 mdjg 40 2 encourage him to come up, and if they believe that they 3 could draw an inference from that, they may properly draw 4 an inference that he did in fact entrap him, and if they 5 believed that I would ask your Honor that there be an 6 instruction on entrapment given. 7 THE COURT: No. You do have an exception, 8 though. 9 MR. DIAMOND: All right, sir. 10 Your Honor, also on the question of the crime 11 of sending the explosive bullet through the mails, I would 12 ask that your Monor give an instruction that if the Govern-13 ment, in attempting to prove acts by the defendants or 14 either of them establishing a crime, in so doing engaged 15 itself in criminal acts through its agent or agents, then 16 the jury must not consider that evidence if it believes that 17 evidence was tainted as a result of a crime or crimes 18 committed. 19 THE COURT: I am not going to charge that. But 20 you have an exception. 21 MR. DIAMOND: Can you charge something to that 22 effect? 23 THE COURT: No, sir. 24 Is that it? 25 MR. DIAMOND: No, sir. I would ask that your

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Honor also consider the readmission into evidence of Dr. O'Connell's first report, which we agreed to withdraw on the ground it contained matter admitting guilt, that he was going to plead guilty and was going to be supervised later.

This report was used by Dr. Portnow and Dr. London in their examinations, and I have deleted the references to that. The exhibit number is still on it. It isn't in evidence until we agreed to remove it.

I would ask that since the doctor, Dr. O'Connell, does make mention of the fact that there is evidence of abnormal emotional illness in his makeup, that this be readmitted in evidence, because I remember your Honor specifically talking to Dr. Portnow about that, whether or not he checked with Dr. O'Connell to find out what he meant by that.

THE COURT: I'll reread it. I won't rule on it right now. But I am fearful, if you give something to a jury which is so hacked up, they are going to, although they shouldn't, wonder, "What the blazes are we getting? Half a loaf?" I hate to do it.

I think it would be more prejudicial to your side than anything else. It's come out in the testimony of Dr. Portnow for them to consider that part of it. don't think you need anything more.

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MR. DIAMOND: All right, sir. Thank you,
your Honor.

THE COURT: Let's make arrangements for the jury to get lunch.

(In open court, jury present.)

THE COURT: Mr. Keenan, do you have any personal belongings in the jury room?

ALTERNATE JUROR NO. 1: Just my coat.

THE COURT: Would you go into the jury room now with the Clerk and get it?

(Alternate juror discharged)

THE COURT: All right, ladies and gentlemen.

That leaves twelve people who are presently in the box to deliberate in this case. Please don't talk about it unless all twelve of you are present in the jury room, so that each of you can have the benefit of the views of the others.

Swear in the marshal.

(A United States Marshal was sworn.)

during your deliberations, in the custody of a couple of marshals. The idea is not to keep you in but to keep other people out. However, since I do believe in running a civilized courtroom, the marshals have been requested to arrange for you to go out and have lunch very shortly.

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THE COURT: Are those the ones redacted?

MR. LEVINE: Yes, your Honor.

MR. LEVINE: Yes, your Honor.

THE COURT: The second one reads, "Could we have an outline of the charges, twelve copies, for each of the jurors?"

I believe that's the indictment. Do you have twelve copies of the indictment?

MR. LEVINE: I don't, your Honor. The Government does have a redacted indictment, which contains three counts, which the Government prepared sometime in advance of trial. I can have that Xeroxed right now, if you would like.

THE COURT: Do you want the whole indictment in?

MR. BOYAN: Redacted, it would just drop out

the Smith counts, is that right?

THE COURT: I assume, yes.

MR. BOYAN: Are then numbered One, Two and Three in the redacted version?

MR. LEVINE: Yes.

MR. BOYAN: And Count One is the conspiracy count?

MR. LEVINE: Yes.

MR. BOYAN: I would have no objection, your
Honor, except that I think that there ought to be perhaps
some inquiry to make sure that it is not the docket entries

1	mdjg 45
2	on the back of the original that they are interested in.
3	I don't think so, but I think maybe there ought to be some
4	inquiry.
5	THE COURT: I am pretty sure it's not. They
6	are asking for the charges.
7	I will tell you what I will do, though. Get
8	this Xeroxed.
9	MR. LEVINE: I have four copies.
10	THE COURT: Four isn't going to do. They asked
11	for twelve and they will get twelve.
12	Where are the letters now?
13	MR. LEVINE: I have just handed them to the
14	Clerk.
15	MR. DIAMOND: They said "all letters," didn't
16	they?
17	THE COURT: "May we please have the letters
18	Dwyer wrote?"
19	Any letter that he wrote, yes.
20	MR. LEVINE: Your Honor, you might ask the jury
21	which of the Dwyer letters they are interested in. It is
22	the Government's position they are probably interested in
23	the four letters Dwyer wrote to Smith and not the additional
24	letter that Duver wrote to his third grade teacher.

THE COURT: That is not what they said. They

1	ndjg 46 774
2	said "the letters Dwver wrote," and that's wha' they are
3	going to get.
4	MR. LEVINE: If Mr. Diamond has no further
5	letters to hand up to the Court, I would ask to be excused
6	to Xerox the documents.
7	THE COURT: Hold on a second. I want you to
8	hear what I am going to write back to the jury.
9	I am sending the letters in with the following
10	note: "Ladies and gentlemen, here are the letters Dwyer
11	wrote. The indictment is being Xeroxed. It will be
12	supplied to you shortly. If there is anything else you
13	want, please advise."
14	I signed it and it's got a "USDJ" under it.
15	Does anybody object to that?
16	MR. LEVINE: No, your Honor.
17	MR. BOYAN: No, your Honor.
18	MR. DIAMOND: No, your Honor.
19	(At 2.40 p.m., Government Exhibits 10A, 29A,
20	31A and 32A and Defendant Dwyer Exhibit 15 and twelve
21	copies of the redacted indictment were sent in to the jury.)
22	(At 3.45 p.m., in open court)
23	THE COURT: I have received another note from
24	the jury, which will be marked as Court Exhibit 6. It
25	reads:

1 mdjg 47 775 2 "Are we to bring in a verdict on three separate 3 counts for each defendant?" 4 It is signed by the foreman. 5 The simplest thing is to write "Yes" at the 6 bottom and send it back to them. 7 Is everybody agreed? 8 MR. LEVINE: Yes, your Honor. MR. DIAMOND: Yes, your Honor. They don't say 10 what kind, do they? 11 THE COURT: 12 (Court Exhibit 6 was marked.) 13 (At 4.00 p.m., in open court.) 14 THE COURT: We have received a note which 15 indicates the jury has reached a verdict. Whatever the 16 verdict might be, I want no outbursts in the courtroom of 17 any type. 18 All right, Mr. Clerk. Bring back the jury. 19 (The jury returned to the courtroom.) 20 THE COURT: Ladies and gentlemen, I received a 21 note which indicates that you have reached a verdict. 22 Mr. Clerk, would you take the verdict, please. 23 THE CLERK: Yes, your Honor. 24 Members of the jury, please answer present as 25 your names are called.

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1	mdjg 48 776
2	(Jury roll called - all jurors present.)
3	THE CLERK: Mr. Foreman, have you agreed upon a
4	verdict?
5	THE FOREMAN: We have.
6	THE CLERK: On Count One, how do you find the
7	defendant John Dwyer? Guilty or not guilty?
8	THE FOREMAN: Guilty.
9	THE CLERK: On Count Three, how do you find
10	the defendant John Dwyer? Guilty or not guilty?
11	THE COURT: That's the second count of the
12	thing that you had.
13	THE FOREMAN: Is that addressed to me, your
14	Honor?
15	THE COURT: Yes.
16	THE FOREMAN: Guilty.
17	THE CLERK: On Count Four, how do you find the
18	defendant John Dwyer? Guilty or not guilty?
19	THE FOREMAN: Guilty.
20	THE CLERK: How do you find the defendant John
21	Dobranski on Count One? Guilty or not guilty?
22	THE FOREMAN: Guilty.
23	THE CLERK: On Count Three, how do you find
24	the defendant Dobranski? Guilty or not guilty?
25	THE FOREMAN: Guilty.

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1	mdjg 49 .777	
2	THE CLERK: On Count Four, how do you find the	
3	defendant John Dobranski? Guilty or not guilty?	
4	THE FOREMAN: Guilty.	
5	THE COURT: Poll the jury.	
6	THE CLERK: Members of the jury, listen to	
7	your verdict as it stands recorded.	
8	(Each juror, upon being asked "Is that	
9	your verdict?", responded in the affirmative.)	
10	THE CLERK: Jury polled, your Honor.	
11	THE COURT: Do you wish anything else, gentlemen?	?
12	I assume you want to make motions at sometime. But we	-
13	don't need the jury here for that.	-
14	Mr. Clerk, would you escort the jury from the	
15	room.	-
16	Ladies and gentlemen, would you wait for me a	
17	moment or two in the jury room?	-
18	(The jury left the courtroom.)	
19	THE COURT: Do you want to make your motions	
س	now?	
21	MR. BOYAN: The only thing I want to do now is	
22	apply for a continuation of bail.	
23	THE COURT: Do you object?	

THE COURT: Bail for both defendants will be

MR. LEVINE: No.

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STANLEY L. PORTNOW, M.D., P.C.
823 PARK AVENUE
NEW YORK, N. Y. 10021
BUTTERFIELD 8-1877

EXHIBIT U.S. Dist Court S.D. of NY.

De sember 13, 1975

Mon. Kevin T. Duffy United States District Court Southern District of New York Folloy Square, New York 1ty 10007 Dec 15, 1975

RE: USA V. DWYFR ET AL 75 Cr 311 (KTD)

CC. Milton Diamond, Esq.
Alan Levine, Asst. U. S. Attorne,

Deer Judge Duffy:

Per your recent request; I undertook a psychiatric evaluation of John J. Dwyer, Jr. in order to determine his criminal responsibility as outlined in grand jury indictment 75 Cr 311.

#### SOURCES OF IMPORMATION:

1. Letter from Milton Diamond to Robert Gold dated 9/4/75.
2. Letter from Milton Diamond to Robert Gold dated 10/20/75.

3. Psychomogical report on John Dwyer by Mary O'Connell, Ed.D. and James J. O'Connell, M.D. --9/11 and 9/15/75.

4. Indistment 75 Cr 311, United States District Court, Southern District of New York.

5. Report of medical examination from U. S tir Force Hespital, Forbes Air Force Base, Topeka, Kansas, 1/4/50, re: Jo' . Dayer, Jr., #4F11296411.

6. Memo from Walter's Pharmacy, Edison, now Jersey.

7. Psychiatric examination of John J. Dwyer, Jr., 12/12/75.

8. Conversation with John Dwyer, father of defendant, 12/12/75.
9. Consultation with Alan Levine, Asst. U. S. Attorney, 12/13/75.

HISTORY: The defendant was born in Perth Amboy, New Jersey on 9/9/37 to a family of Irish-German-Catholic extraction. His parents are alive and well and presently retired. He has one brother, age 28, who is a Captain in the U. S. Marine Corps. There is no family history of mental illness. The defendant at birth had a pyleric sterosis which was surgically corrected. He attended the Clara Barton grade school in Edison, New Jersey from grades one through mine and Forth Amboy Eigh School from grade 10 through 12, graduating in 1)55. He describes himself as a good student who tried to compete in athletics but was not strong or coordinated enough. He claims that his parents were very strict and that he had a poor relationship with his brother. He held part time jobs from the age of sleven and had some male friends. Fellowing graduation from high school, he joined the U. S. Air Force and was stationed at Samson Air Force Base, Geneva, New York; Parks Air Force Base, Pleasanton, California; Eielson Air Force Base, Pairbanks, Alaska; and Forbes Air Force Base, Topeka, Kansas, from where he was discharged. He achieved the rank of B3. The records show that he was under the care of an Air Force payehistrist from January through March, 1959, and a medical examination on 1/4/60, prior to discharge, noted as anxiety reaction; chronic, mederate, not incapacitating. Pollowing his discharge, he stayed in Kansas for two or three months and then returned home in Amgust, 1950, where he worked for a short time as a construction laborer. In January, 1961, he began his present jeb as a semi-machinist.

The defendant is beterosexually oriented and denies any bistory of veneral disease. He claims that he sometimes drinks alcohol to excess and at other times

Exhibit - Letter Dated December 13, 1975 from Stanley L. Portnow, M.D. to Hon. Kevin T. Duffy

abstains. He denies any use of drugs. He has never married and lives with his parints. He has a history of rheumatoid arthritis, histal herais, and a duodemal ulcor. During the period of about 1966-70, the was under the care of Mr. Paul Smafir, a psychiatrist in New Jersey (now deceased). He claims that he was referred to him by his family doctor and that he received tranquilizers. He stakes that he felt very self-concious and unconfortable with people due to his mystagmum and facial assymetry and that he was a loner. His visits to the psychiatrist became sporadic when he felt that he had nothing more to say and he discontinued treatment shortly before the doctor died. Following the alleed incident, the patient was examined by the Doctors O'Connell, who concluded that he had a schisoid personality with obsessive and compulsive features. The patient claims that at the present time he is in once weekly therapy with psychologist Ken Pargament at the Metuchen Count; Mental Health Center and receives no medication. He has no previous arrest or criminal record.

Mr. Dayer reports that at about age five he began collecting game. He alleges to have collected 300 to 500 game, but that the most he has had at one time was about 230. He has also had various quantities of assumition and most of the game were capable of being fired. He has always been very curious about game and considers himself to be quite knowledgeable. He claims that he has never threatened or harmed anyone with a gam. At one time, he had a federal dealer's license, but thened it in because he was not a bona like dealer, just a collector. He does not, he alleges, have peculiar matics of abnormal fascinations with game outside

of the natural curioaity and interest of a hobbyist.

With reference to the instant charges, Mr. Dayer says that a man by the name of Smith whom he had met some six or seven weeks prior to the incident at a gun show in Ohio knew that he had some machine guns. "After the gun show, I never thought I'd run into him again until he called me and tried to arrange a sale. Swith snew I had machine guns and began calling me and asking if I had any to rell. I said I wasn't interested because I didn't want to sell to the wrong people -- criminals and radical types. Smith was also a collector and said he had friends who wanted machine guns. I repeatedly naked him if he knew these people and he said that they were collectors also. He convinced me that his friends were 'safe'. Basically, Smith asked me to do him a favor and I have always been a soft touch. It turned out, however, that of his two friends, one was a government agent and one was a government informer. I was convinced that no harm could come from selling the guns and stated a price of \$250 for a massian Submachine gun and \$50 for a German 8-F gun. I was sware that selling guns was against the law. (Why did you do it ) I felt that the lew was besically to keep guns away from criminals and I wasn't a criminal." Mr. Dwyer went on to state that the law basically is unfair because you could buy machine gous in some states and not in others. He explained that handling and trading gume were second nature to bim. "I was supposed to go to Smith's apartment and I asked my friend Dobranski to take me to Smith's risce. To make it more interesting to Dogranski, who was also a gun collector, I told him that Smith had a fine gun collection. We went to Smith's place at 15) Oak View Drive, Feekskill, on Junuar, September 1, 1774. I remember I had been to a wedding the night before and had a hangover. Dobranski and I were there with Smith and his wife and later the Pressury agent and the informer arrived. These two were supposedly long-time friends of smith. I trusted Smith. (What would you have done if you had known that Smith was an informer and that Smith and the agent were lying.) I would have said that two runs were not for sale and sude some excuse to get out of it. (Why ) If I had 1,000 machine guns, no harm would come from them. I have always been very fearful and careful that they not get into the wrong hands. That is why I kept demanding from Smith whether these may were o.k .. Union and I went to Dobranukl's car and got the game. I said, 'that

Exhibit - Letter Dated December 13, 1975 From Stanley L. Portnow, M.D. to Hon. Kevin T. Duffy

should I say about the price: and Smith said, 'Don't say anything, let me bankle that.' K (agent) looked the guns over and Smith whispered in his ear and K handed me \$350.00. I remember saying to Smith, 'Why did you charge so much?'. Smith said, 'They screwed me once and I am getting even.' I gave Smith \$250 and kept \$500 for myself; there was no plot to divide up the money in any way. Dobranski got nothing but an incorrect studge on the way home.

'On October 9th, 1974, I went to daith's apartment with Dobranski again for another sale of pistols and Kelly and Costabile were there. We had one drink and than this flying squad came flying through the door and arrested us. I was at the Federal House of Decention for the days and then released on (5,000 bail on by own recognizance.

Hr. Dwyer claims that he was not cearing voices or feeling ill or in any way functioning abscraally on teptember 1, 1/4 or October 1, 1/4.

FUYCHIAIRIC STATUS: The patient is a cooperative, neatly dressed was with a neticomble nystagens. Is looks depressed and concerned. He is oriented to time, place and person. He knows that the date is 12/12/7, that he is at a office at 12; Park Avenue, and that his full name is John James Dayer, Jr.. His affect is terribly plunted and sometimes imagpropriate to his thought centest. His speech tunds to be extremely circumstantial. He denies hearing voices (halludinations). No decisions were elicited. His intelligence in commensurate with the level of his education and his fund of information on guns and firearms seems endless and must surely to considered to be superior. He is able to engage in simple arishmetic tunks. He knows that the sum of 10 plus 10 is 20 and the product of 10 times 10 is 100. He can compute that if he paid \$2.00 for \$1.00) worth of grownies that he would receive lig in change. He is able to list the Fresidents of the U. 3. in proper reverese sequence from ford through Kennedy. Its judgement is good. When asked what he would do if he found a starped, addressed envelope on the street, he roplied, 'Put it in the mailbox." If he were the first in a crowded thestre to notice a rire, he would "notify the management and try to prevent panic." He can concentrate well and subtracts serial sevens without error. His ammory for recent and remote events is intact. The most significant aspect of the psychiatric exemination concerns this man's personality structure. He is a loner, quite withdrawn, almost friendless except for his therapist. His characteristic lefenser medianisms of withdrawel and isolation supplemented with compulsive procesupations enn, under stress, give rise to depression. Mr. Dugar does not suffer from a discreeable mental disease or disorder. He has a personality structure best described as schizoid with obsessive compulsive features.

#### CONCLUSIONS AND RECOMPERIDATIONS:

1. It is my professional opinion, based on the above, that Mr. John J. Dwyer, Fr. on September 1, 1975 did not possess a mental disease or defect which deprived him of substantial aspecity to appreciate the nature and consequences of his conduct or to conform his behavior to the requirements of law.

2. It is further my professional opinion that Mr. John J. Duyer, Jr. on October 5, 1978 did not possess any mental disease or defect which deprived him of substantial especity to appreciate the nature and consequences of his conduct or to conform his behavior to the requirements of law.

Very truly yours,

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Stanley L. Portnow, M.D., F.A.F.A.

Biplomate, American Board of Psychiatry and Heurelogy

Psychiatric Consultant, American Bar Assoc. Committee on Psychiatry & the Law

REPORT OF JOHN DWYER BY DOCTOR JAMES J. O'CONNELL DATED DECEMBER 20, 1975

JOHN DWYER

3963 PARK AVENUE

EDISON, N.J.

James J. O'Connell, M.D. 1225 Livingston Avenue North Branzwick, N.J. Report of John Dwyer by Doctor James J. 0'Connell 299a
Dated December 20, 1975

NAME: John Dwyer

ADDRESS: 3963 Park Ave., Edison, N.J.

AGE: 38

DATE OF AKREST: October 5, 1974

DATE OF LEPORT: December 20, 1975

psychological examination, testings and evaluation of patient John Dwyer to determine whether he was then suffering from mental abnormality preventing him from leading life normally expected of man his own age; and if so, whether such mental illness was treatable with some possibility of remission or correction. Thereafter this office submitted a written report on patient John Dwyer, advising that "There is evidence of shnormal emotional illness in his makeup"; that "There is every probability that he will improve if treated"; and that the trauma of his arrest and present ordeal would act as a deterrent in the future.

and extensive interviews and from standard psychiatric, neurological and psychological testing of the patient, with the assistance of Mary O'Connell, Ed., D.; as well as consideration of charges against the patient, and review of his January 4, 1960 United States Air Force Clinical hecord, noting "Between December 1957 and that "He was under the care of Air Force psychiatrist between January and March 1959".

Report of John Dwyer by Doctor James J. O'Connell
Dated December 20, 1975

-8

However, unable to consider Air Force psychiatric reports; or records of Dr. Stuart (a psychiatrist who treated patient Dwyer after leaving Air Force) since same either unavailable or no longer in existence. But supportive evidence that patient Dwyer did undergo psychiatric therapy and treatment By Dr. Stuart in 1967 is found in list of psychogenic drugs prescribed by Dr. Stuart for patient, such as thorazine, this factor also being considered in making evaluation.

Have rendered initial ps.ychotherapy to patient Dwyer; who is also out patient of hutgers Mental Health Center in Metuchen; and appears to be making satisfactory progress and adjustments in absting or at least dealing realistically with deeply imbeddedpsychasthenia, a psychosis characterized in patient Dwyer by all-consuming obsession with trophies of war and overwhelming compulsion to collect and trade in war memorabilia, this condition existing since boyhood and worsening over the years, until arrest in October, 1974, at which time obsessive-compulsion psychosis of patient Dwyer dominated entire life and ruled his conduct against his conscious will.

Have now been asked to render opinion and report dealing with legal question as to whether there was a cassal connection between the mental absertial patient Dwyer as diagnosed and the alleged unlawful acts charged against him; and also with the legal question of whether, as a result of his mental disease or defect, patient Dwyer lacked substantial capacity on September I, 1974, and on October 5, 1974, either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Report of John Dwyer by Doctor James J. O'Connell
3 Dated December 20, 1975

In arriving at opinions, have considered not only all the factors related above, but also the recent court testimony taken under onth from various wit: reses an ong whom were family members and the third rade school teacher of patient Dwyer. A part of this testimony is as follows: That patient, since early childhood, has always been and still is passive, sny, reclusive, introverted, a loner, and lacks aggression; that, at the age of d, his father sent him some empty ou caliber shells, patient responding by postcard, "Thanks for the bullots Dad, can you please send me the machine "un"; that he has never married, never voted, has no political beliefs, has night I. W. but low paying job as machinist, and little, if any, social life; that, unlike his younger brother Robert, he was never mischievous as a pey, and in fact, has never before been in any trouble or sun afoul of the law; that his father, a naval veteran of Pacific War, has made physical courage the uiding standard of his own life, and once badly nest patient as small noy because patient would not flight back when besten by an even smaller boy; that patient, when in third \_rade, became obsessed with souvenir Luger pistol brought to class by teacher, pretending it to be his own to exclusion of other classmates; that, a year or so before his arrest in 1974, patient sent third grade teacher letter saying words to effect that Luger incident was probably nighest point of his academic career; that proud family ... ilitary neritage oes nack to War of 1812, with ancestry also in all American wars since then; that uncle was army colonel in Asiatic theatre, World War II, cousin a Warrant Officer in helicopter medi-vac unit in Vietnam was, seriously wounded and decorated; that 29 year old brother is decorated Marine Captain, pilot of Phanton jet; that patient has collected huge assertment of war paraghernalia in basement of imulty nome, including insignia, medals, uniforms, twords, nelmets, model planes, pictures, books, hob-nailed boots, camouflage, etc., of World War II, and who is virtual expert on World War II;

DWYEL

Report of John Dwyer by Doctor James J. O'Connell Dated December 20, 1975 that he has been preoccupied almost all his life with artifacts of World War II, dealing and trading not for profit but only to increase or improve his collection; that he spends all his ... oney on his collection, on ifts for his family, or on stray cats which he befriends, feeds and shelters; that he wrote letters to a man he thought ne could trust, one Steve Smith, using obscenties common to soldiers, expressing feat of being apprehended for violating gun laws, but neve theless continuin, to deal and trade in them; that he talked of buying a tank or . . idget sub, if he had the .. oney; that he .. ept a Japanese skull in his basement, lined tables with helmets on plastic heads; and even made his own soldier ... anequins which he dressed in .. niforms; that he had pneumonia some ten times, at times with 104 -105 temperatures; that, aside from his low paying job as a machinist pursued by him only to further his knowledge of the workings of weaponry, his whole life was devoted almost entirely to his collection which he will not permit his father to touch or nandle; and that aside from some : 1/2 years of military service, he has always lived with his parects; that he is extremely self-conscious about his appearance, has very low self-esteem, and ecently told his third rade school teacher that the reason

Based upon all these factors, and any anowledge and understanding of the patient ained from interviews, tests and treatment, it is my opinion that on September 1, 1974, and Octobe. , 1974, the accused patient, John Dwger, was in truth suffering from a ...ental disease or defect which deprived him of substantial capacity to conform his conduct to the requirement s of law;

that he was not married was because "Nobody wants me."

Dw /er

Report of John Dwyer by Doctor James J. O'Connell
Dated December 20, 1975
and it is my further opinion that the criminal acts charged against him on
September 1, 1974, and on October 3, 1974, were the direct products of his
mental disease or mental defect diagnosed as psychasthenia, or an allconsuming obsession and overwhelmin compulsion in patient Dwyer to deal
and trade in weaponry and other trophies of warfare that dominated his life
and ruled his behavior and conduct a sinst his conscious will and over which
he rad no control.

It is to be noted that the "abnormal emotional illness" referred to in fixet report is payonasthenia, as described above; that the term "disease" which can be used alternately with other terms such as disorder, illness, etc has been used in this report to describe a condition capable of improving or deteriorating; and that the term "defect", which can also be used alternately with such terms as disorder, abnormality, or deficiency, has been used in this report to describe a condition not considered capable of either improving or deteriorating, and which may be either congenital or the result of injury or the residual effect of a physical or a mental disease. There is the redical probability that the defect in question by have resulted from the high temperatures caused by pheumonia, as referred to in first report.

James J. O'Connell, M.D.

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		304a TRANSCRIPT OF PROCEEDINGS DATED DECEMBER 23, 1975
Judge Duffy		THANSENTE OF PROCEEDINGS DATED DECEMBER 23, 1975
mdlt 1	1	UNITED STATES OF AMERICA
	2	vs. 75 Cr. 311
_	3	JOHN J. DWYER and JOHN S. DOBRANSKI,
0	4	
	5	December 23, 1975
	6	
	7	(In open court - jury not present.)
	8	THE COURT: Mr. Diamond, I understand you
	9	have some motions?
	10	MR. DIAMOND: Yes, your Honor.
	11	Your Honor, I would like to make at this time
	12	a motion for a mistrial based upon two aspects of the
	13	case:
	14	I regard each of these aspects as equal1,
	15	prejudicial and virtually devastating to our case.
	16	First, your Honor, is yesterday in Mr.
	17	Boyan's summation as I recall, your Honor, Mr. Boyan made
	18	reference to the letters "BSJ," and he questioned whether
	19	or not BSJ stood for the name of his client, since only
	20	one of the letters there could possibly pertain to his
	21	name, namely, "J", which is John.
-	22	Mr. Boyan went on to say, your Honor, that
<u> </u>	23	he was at a tremendous disadvantage, his client was at a
	24	tremendous disadvantage, and I am only interpolating, I am

not trying to give his exact words, but this was my

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impression, and that the reason that his client was prejudiced or was put at a disadvantage, was put in jeopardy,
was because this was in the form of a letter and that he couldn't cross examine a letter.

And then your Honor may recall that he started to ask rhetorical questions to the letter.

Your Honor, in doing that, as I recall, although I did not write these notes down, he said that the reason he couldn't get any answer from the letter is because Mr. Dwyer, my client, did not take the stand and submit himself to cross examination by Mr. Boyan so that he could establish definitely that this was not his client, "BSJ" was not his client.

Your Honor, the government's position is that Mr. Dwyer, as I see it, is the main culprit here, he owns the guns, he made the arrangements to go up to Peekskill, and that although Mr. Dobranski was not involved in that transaction, that Mr. Dobranski was advised by Mr. Dwyer of the purpose and that he knowingly and willingly wen along and therefore was involved in the conspiracy in this transaction.

Your Honor, it would seem to me that looking at the case that way, the jury could believe that Mr.

Dobranski was an innocent bystander, so to speak, or at least the lesser involved inthis matter, and that because

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Mr. Dwyer refused to take the stand, therefore getting him involved in this situation, he now refuses to take the stand and refuses to explain who "BSJ" was.

Your Honor, it seems to me that the jury considering that, or possibly drawing those inferences, could believe that Mr. Dwyer was in effect doing serious harm to Mr. Dobranski and that he, after getting him involved in it, now refusing to get him out of it, should be punished for not coming clean.

Your Honor is more aware than I am of the law on this subject, that the prosecution cannot comment on the failure of a defendant to take the stand -- the refusal of a defendant to take the stand -- because of the obvious prejudice that would cause, and of course the United States Attorney did not make any mention of that.

But, your Honor, we say that we are equally prejudiced by the fact that counsel for co-defendant made this very harmful remark, which shocked me to the point that I couldn't even get my thoughts together at the end to make a proper motion.

I would ask for that reason, also, that a mistrial be granted.

The second reason, your Honor, is on the question of refusal to permit Dr. O'Connell, the treating

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2	physician of Mr. Dwyer, to testify in this matter on
3	the issue of insanity.
4	THE COURT: How many times did he see him?
5	MR. DIAMOND: He saw him four times. I think
6	that's what the testimony was.
7	THE COURT: The last time was in late
8	September.
9	MR. D. MAOND: Your Honor, as I recall, he saw
10	him, his report says, two times, but as I recall his
11	testimony he either told me or testified he saw him
12	more than that.
13	Mr. Dwyer told me he saw him four times and
14	it was Dr. O'Connell who recommended that he go to the
15	Rutgers Medical Center or in Metuchen for treatment, and
16	that's overseeing the treatment of Mr. Dwyer who is his
17	patient.
18	Your Honor knows the background.
19	THE COURT: There was no mention of overseeing
20	any treatment.
21	MR. DIAMOND: I'm telling you that Mr. Dwyer
22	tells me this and Dr. O'Connell tells me this. I don't

Your Honor, our defense, virtually the only

know whether Dr. O'Connell -- I have the transcript here, but

I haven't had the opportunity of reading it yet.

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defense we have, is insanity at the time of these acts, and at page 545 there is a reference to the mental state, the mental disease or defect, or abnormality, or whatever it is.

It says "psychoneurosis," which is not what

Dr. O'Connell said. He said in his report psychasthenia,

but apparently the reporter took down psychoneurosis, and he

described that as an all consuming obcession and over
whelming compulsion for trophies of war.

Your Honor, the first report that he made talked about the fact that Mr. Dwyer said "There is evidence of abnormal emotional illness in his make up," and I take it that what Dr. O'Connell was attempting to do was describe a specific illness now.

Your Honor knows the background of why -the difficulties I am having getting Dr. O'Connell
here, and although I might say to your Honor that
throughout the time that we first were given notice of -prior to this I believe the first notice was December 8th
when we were supposed to start, I had advised Dr. O'Connell
that we were actually going to trial now, that we were
not permitted to go through the plea bargaining that was
criginally offered and that we were going to trial and I
asked him to be ready around Tuesday and Wednesday, and

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that's when he cancelled his appointments and when all the difficulties arose.

From the very beginning, your Honor, he was the only psychiatrist I had in mind since he was the treating physician, and I might also say the only reason I got Dr. London was because of the competency matter we mentioned yesterday and your Honor brought that to my attention that he should be examined to determine competency before trial.

Your Honor appeared to be willing to permit

Dr. O'Connell to testify until the voir dire was taken,
and at that point -- I believe the voir dire was for the
purpose of establishing whether or not he was actually
going to testify to competency at the time of the act,
insanity at the time of the act, but it went further into
the area of credibility, which I believe, I suppose I should
have objected at that point but I didn't because I had no
concern about anything that was going to be said. But
apparently the United States Attorney did, and went on to
attack Dr. O'Connell's credibility, and I guess by extension, my credibility, suggesting something that perhaps
led the Court to belive that the testimony of Dr. O'Connell
did not merit credibility.

I am only surmising that because I don't know,

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because when I asked the Court yesterday to set forth its reasons why the Court said it would not permit Dr. O'Connell and said it was obvious but I tell your Honor at this point.

I have no idea what your Honor means by "obvious."

It seems to me, your Honor, that credibility is a subject matter for the jury to determine, whether or not the testimony of Dr. O'Connell had any value, whether he should be believed, and that by excluding his testimony our case received a devastating blow.

THE COURT: If you want to know what my views are on Dr. O'Connell's credibility, that is not what I based it on, but Dr. O'Connell's credibility is just about zero.

MR. DIAMOND: Pardon me, sir?

THE COURT: Read it back, please.

(Record read.)

MR. DIAMOND: I have no idea of why your

Honor would say that, and I guess just a feeling your

Honor might have, but I would appreciate it if your Honor

would set forth on the record the basis for that belief.

THE COURT: The basis for the belief?

MR. DIAMOND: Yes, sir.

THE COURT: I get paid in non-jury cases to determine credibility. I watched that man testify,

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I listened to him, and I was shocked that a medical doctor could get to the point where he would do what Dr. O'Connell did.

MR. DIAMOND: Your Honor, I didn't have the opportunity -- I'm sorry.

THE COURT: The report which he submitted, the second one, the one yesterday, is not much better than his testimony.

But you're asking about credibility, and I told you.

MR. DIAMOND: I appreciate your candor, your Honor.

The only problem I have, your Honor, is that the reason I obtained Dr. O'Connell in the first place, is that like many Middlesex County, New Jersey attorneys have retained Dr. O'Connell as a forensic psychiatrist, he is the only one in Middlesex County who is still alive.

I'm sorry I didn't put in his qualifications.

He has had forty years' experience. He has headed the

New Jersey State Hospital, his whole life has been devoted

to the study of abnormal psychology and psychiatry, and he

is well respected in our New Jersey courts.

So far as I know, I have never heard any attack on his credibility except here today.

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THE COURT: Well, that's why I didn't want to put that in the record. You wanted it in, and it is in.

MR. DIAMOND: I appreciate your Honor having been extremely candid throughout the proceedings, and I appreciate that very much.

Nevertheless, your Honor, perhaps just as a Judge and an attorney talking to each other, with my knowledge of the law, which is certainly far less than your Honor's, I would respectfully and most humbly submit to your Honor that that question of Dr. O'Connell's testimony as to credibility, should have been judged, ought to have been judged by the jury.

So far as I know --

THE COURT: But that is not why I excluded it.

If it was just a question of his credibility, I assure you that the government could have done a number on him.

MR. DIAMOND: Is there another reason why?

THE COURT: Sure. There are lots of other reasons.

MR. DIAMOND: Would your Honor be kind enough to submit them on the record?

THE COURT: No. I am running a courtroom, not a classroom.

MR. DIAMOND: I take it they are logal reasons?

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THE COURT: Yes.

The motions for a mistrial are denied.

Bring in the jury.

## TRANSCRIPT OF PROCEEDINGS DATED FEBRUARY 13, 1976 314a Excerpt 1 RKjw 1 2 UNITED STATES OF AMERICA 3 v. 75 Crim 311 4 JOHN J. DWYER 5 6 February 13, 1976 New York, New York 7 8 BEFORE: 9 HON. KEVIN THOMAS DUFFY, District Judge 10 11 APPEARANCES: 12 THOMAS J. CAHILL, ESQ., Attorney for the Government 13 BANCROFT LITTLEFIELD, ESQ., Assistant United States Attorney 14 MILTON DIAMOND, ESQ., 15 Attorney for Defendant Dwyer 16 17 000 18 19 THE COURT: Mr. Diamond, do you wish to 20 be heard on behalf of Defendant Dwyer? 21 MR. DIAMOND: Just briefly. 22 Your Honor has heard through some two weeks 23 of trial more about Mr. Dwyer's life than I could possibly express at the time of his sentencing today and I 21

recollect the fact that your Honor is perceptive and that

rkjw 2

what is is not controlling and your Honor will make his own judgment about Mr. Dwyer based upon what he heard testified to under oath by his family and other witnesses and psychiatrists.

I would say to your Honor some personal remarks, that this has been a particularly trying matter not only for Mr. Dwyer, whose faith is in your Honor's hands today, but for me personally since I have known his family for many years.

I know also that this is a particularly trying thing for the Court as well because I suppose there is nothing more difficult and unpalatable to a Court than to impose sentence on a fellow human being.

by my personal knowledge of the family I may not have done the best job I could have done if I had been perhaps more objective. I do believe and have always believed, that Mr. Dwyer has this compulsive obsessive illness that has made him a collector of war artifacts, war trophies all his life, and that he could no more, at least until now, have changed himself or ridden himself of that habit than could an alcoholic rid himself of the habit of drinking alcohol or a compulsive drug addict rid himself of that habit as well.

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I also, your Honor, feel that if I had not known Mr. Dwyer personally I could have presented this through psychiatric testimony in a more able fashion and convincing fashion so the jury could have better understood what we were attempting to show.

Be that as it may, the jury has found him guilty on most serious charges and I recognize as Mr. Boyan did that these are most serious offenses.

I would also point out your Honor, as Mr. Boyan did, that Mr. Dwyer who has this compusiion, did so not out of any attempt for private gain. He has led a totally exemplary life. He has never ever been involved in any trouble whatsoever from the time he was born up until this recent incident.

Indeed, your Honor has shown us the courtesy of reviewing the pre-sentence reports. The pre-sentence reports indicate that he was an average student but of good attendance and that he tried his best to overcome his particular type of personality defects that led him into this very arcane area which apparently gave him some happiness and comfort in life. He has never married, he has no outside interest and this was his whole life, his whole obsession.

I think the trauma of the arrest, the trauma

rkjw 4

of the Court trial and perhaps the psychiatric advice he has been getting and continuing to get, will be factors in preventing him ever again from involving himself with weaponry.

I would also like to point out to your Honor that there was some testimony in the case where Mr. Dwyer appeared concerned that any of these weapons should fall into the hands of people who may use them.

I think your Honor, all in all, that if Mr.

Dwyer is granted an opportunity to go back to his job and to his life, I think he will never ever engage in this type of activity again. All the reports I have seen indicate that he will undoubtedly not go back into that area.

I do believe that justice in this particular instance should be tempered with mercy and I would ask your Honor in exercising this tremendous power your Honor has rightfully given to him in situations such as this, to exercise it in this situation with the utmost compassion and understanding.

THE COURT: Mr. Dwyer, do you have anything to say for yourself?

THE DEFENDANT: No, sir.

THE COURT: I am half tempted to give you the

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maximum sentence and send you away to be studied. I was pretty unconvinced by the psychiatric testimony at trial. One psychiatrist came up with a report of an illness which is not recognized in the psychiatric profession. The other fellow has never been Board-certified.

But I see you are seeking psychiatric help.

It may well be that the psychiatrist, particularly in view of the testimony of your father, may recommend that you move out. If he does, I want you to do it within two weeks.

Imposition of sentence will be suspended.

Defendant will be placed on probation for a period of five years. A special condition of probation be that he continue to seek and accept psychiatric help.

You are getting a break which you may not be entitled to. If you ever show up in this courtroom again you will really be in trouble.

Mr. Dobranski, you and Mr. Dwyer both have the right to appeal the conviction fro the jury and then from the judgment of conviction which will be entered today. If you do not have sufficient funds to do this on a private basis, the clerk will file a notice of appeal for both of you.

319a

# NOTICE OF APPEAL (Filed February 16, 1976,

UN TED STATES (	Sou OF AMERICA,	thern Diet	rict of	New Yo	ork		
vs			Docket N			311 (1	(TD)
			Hon Ke	THE RESERVE OF THE PERSON NAMED IN	Duffy		
				(District	Court .I.	e)	
STEPHEN J. SMIT	H, JOHN J.	DWYER and					
		NOTICE OF AF	PEAL				
Notice is hereby give	n that JOHN						
						appeals to	
the United States Court of	of Appeals for the	Second Circuit	from the 2	Judgmen	torder	u other	
(spec:'y)		entered in this ac	tion on	Februa	ary 13.	1976	
			-	7	(Date)		
			1	1.1.	11.	, ^	. 1
			1	MERYPON	P. AADA	anti	
Dete February 16,	1976	Address	ı	The Gate House			
Alan Levine River Road							
Assistant Un	nited State	<ul><li>Attorney</li></ul>		Highla	nd Park	, N.J.	08904
Mr. John J. Defendant	Dwyer	_					
		Phone Number		(201)	846-250	0 .	è
TO BE COMPLETED	ECESSARY						•
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The ATTCRNEY certifies that he the transcript. (FRAP 10(b))  ATTORNEY'S signature	Method of paymer	t & Funds	nts with the	court rep	orter for pe	yment of th	e cost of
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In aure Denasters

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA. Plaintiff- Appellee,

- against -

JOHN J. DWYER. Defendant- Appellant. index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

being duly sworn. I. Reuben A. Shearer depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street. New York New York 10030

day of April 19 one Sta. Andrews Plaza, New York, New York deponent served the annexed Appendix

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upon

Robert B. Fiske Jr.,

That on the

the Attorney in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said herein. papers as the

Sworn to before me, this April day of

ROBERT T. BRIN NOTARY PUBLIC, State of New York No. 31 - 0418950

Qualified in New York County Commission Expires March 30, 1977

Reuben Shearer